1. Transmitted is revised Department of Veterans Affairs, Veterans Health Services and Research Administration Manual M-1, "Operations," Part I, "Medical Administration Activities," Chapter 9, "Release of Medical Information." Because of the extensive revision, brackets have not been used to identify changes.

2. The purpose of this revision, other than editorial, is to consolidate all previous instructions on release of information, and to:

a. Provide instructions for complying with provisions of the Privacy Act.

b. Provide instructions for complying with provisions of the Freedom of Information Act.

c. Provide revision of the instructions on the release of information from drug and alcohol abuse, infection with the human immunodeficiency virus, and sickle cell anemia medical records.

3. **Filing Instructions**

Remove pages	**Insert pages**
9-i through 9-iv	9-i through 9-iv
9-1 through 9-24	9-1 through 9-61

4. **RESCISSIONS:** M-1, Part I, Chapter 9, dated March 15, 1974, and Errata; Circular 10-88-134 and Supp. No. 1 and No. 2, and the following Interim Issues:

II 10-75-42	II 10-81-3
II 10-76-18	II 10-81-4
II 10-76-30	II 10-81-18
II 10-77-43	II 10-81-21
II 10-78-1	II 10-81-49 and Supp. No. 1
II 10-78-30	II 10-82-18
II 10-79-27	II 10-82-21
II 10-79-32	II 10-82-22
II 10-80-4	II 10-82-36 and Supp. No. 1
II 10-80-18	II 10-82-39 and Supp. No. 1
II 10-80-19	II 10-83-17
II 10-80-43	II 10-83-21
II 10-80-62	

NOTE: *Policy included in this chapter and regulations pertaining to the confidentiality of records protected by the provisions of 38 U.S.C. § 4132 were developed concurrently. The policy pertaining to § 4132-protected records is subject to change as a result of the rule making process.*

James W. Holsinger, Jr., M.D.
Chief Medical Director

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RESCISSIONS

The following material is rescinded:

1. **Manuals**

M-1, part I, chapter 9, dated March 15, 1974 and errata

2. **Interim Issues**

II 10-75-42
II 10-76-18
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II 10-83-21

3. **Circulars**

10-88-134

CHAPTER 9. RELEASE OF MEDICAL INFORMATION

SECTION I. FOIA (FREEDOM OF INFORMATION ACT)

9.01 GENERAL

The FOIA requires disclosure of VA records, or any reasonably segregable portion of a record, to any person upon written request. A FOIA request may be made by any person (including foreign citizens), partnerships, corporations, associations and foreign, state or local governments. VHS&RA (Veterans Health Services and Research Administration) administrative records will be made available to the greatest extent possible in keeping with the spirit and intent of the FOIA. Before releasing records in response to a FOIA request, the record will be reviewed to determine if all or only parts of it can be released. For example, a requester may ask for copies of correspondence on a particular subject. If VA has one or more letters that are applicable and can be released, but the letters contain names of individuals and other personal information, the personal identifying information can be withheld. The remaining parts of the letter(s), with the personal information deleted, cannot be withheld. Consequently, VA will release the letters, but the personal information will be deleted. This process of editing or deletion is referred to as "segregation" or "redaction."

9.02 DEFINITIONS

a. **Health care facility.** For the purpose of this chapter, the term health care facility includes all offices and facilities under the jurisdiction of VHS&RA.

b. **Official Records.** These are records which are obtained, created and maintained by VA. The term "record" includes paper documents, photographs, microfilm, movie film, audio tapes, magnetic computer tape, and electronic impulses stored in a computer memory which can be obtained by an existing computer program or printout.

c. **Non-official Records.** These are records which are maintained and used only by the individual who wrote them. Their maintenance should remain separate from official records. They must not be shown to anyone, nor be required by or under the control of VA so that the individual who maintains the records could destroy them at any time. These records are not subject to the FOIA.

d. **FOIA Officer.** Normally, the Chief, Medical Administration Service is designated as the facility FOIA Officer.

9.03 ACCESS

a. Records or information customarily furnished to the public in the regular course of the performance of official duties may be furnished without a written request. A request for access to official records under the FOIA must be in writing over the signature of the requester and reasonably describe the records so that they may be located; 38 CFR 1.553 provides that FOIA requests must be in writing. This procedure should not be waived for reasons of public interest, simplicity or speed. Written requests provide a basis to support a possible appeal. Generally, the request does not have to be designated a FOIA request and the individual does not have to explain why access to official records is desired. Requests from individuals for information about themselves should be processed

under the FOIA and the Privacy Act. The record sought must be reasonably described so that it can be located with a reasonable amount of effort by an employee who is familiar with the subject area of the request. If the request does not give enough information to identify the record, the requester should be contacted for additional information. The fact that a request involves searching a large number of records does not, in and of itself, entitle a facility to deny the request on the basis that the records are not reasonably described.

b. VA is not required to create or to analyze a record. VA has no legal obligation to write, revise, reassemble, catalogue or to obtain or produce new documents for a requester. If an individual requests another Agency's records which are in VA's possession, the individual will be advised that the request has been referred to that agency or that additional time will be required for VA to consult with such other agency before a determination can be provided.

9.04 FEES AND FEE REDUCTIONS AND WAIVERS

a. There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions requesters; requesters who are representatives of news media; and all other requesters. Specific levels of fees will be charged for each of these categories in accordance with 38 CFR 1.555. When records are requested for commercial use the fee shall be limited to reasonable standard charges for document search, duplication, and review. When records are requested by an educational or noncommercial scientific institution for a scholarly or scientific research purpose and not for commercial use, or by a representative of the news media, the fee will be limited to the reasonable standard charges for document duplication. All other requesters will be charged fees which recover the full reasonable direct cost of searching for and reproducing the records. Fees will not be charged for the first two hours of search time or for the first one hundred pages of duplication, except when the requester is seeking the records for commercial use. Requesters seeking records for scholarly or research purposes, or requests from representatives of the news media, will be charged only for document duplication after the first 100 pages. Requesters of records for commercial uses will be charged for all search and duplication, regardless of the amount of time spent searching or the number of pages duplicated.

(1) **Commercial Use Requesters**

(a) A commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is made. To determine whether a request properly belongs in this category, consideration must be given to the use to which a requester will put the documents requested. Where the use of the records sought is not clear in the request or where there is reasonable cause to doubt the use to which the requester will put the records sought, additional information will be obtained from the requester before assigning the request to a specific category.

(b) The full direct costs of searching for, reviewing for release, and duplicating the records will be charged to a commercial use requester. Such requesters are not entitled to two hours of free search time nor 100 free pages of reproduced documents. Moreover, the commercial use requester will be charged the cost of searching for and reviewing records even if there is ultimately no disclosure of records. Review is the process of examining documents located in response to a commercial use request to determine

whether the documents must be disclosed under FOIA and for the purposes of withholding any portions exempt from disclosure under FOIA. Review costs may not include time spent resolving general legal or policy issues regarding the application of exemptions.

(2) **Educational and Non-commercial Scientific Institution Requesters**

(a) An educational institution is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. To determine whether a request properly belongs in this category, the request must be evaluated to ensure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution, rather than an individual goal of the requester or a commercial goal of the institution. This institutional versus individual test applies to requests from students as well. For example, a student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal and the request does not qualify under this category.

(b) A non-commercial scientific institution is one that is not operated on a commercial basis (as that term is referenced under commercial use request) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(c) These requesters will be charged only for the cost of reproduction, excluding charges for the first 100 pages. In order to be considered a member of this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use. If the request is from an educational institution, the requester must show that the records sought are in furtherance of scholarly research. If the request is from a non-commercial scientific institution, the requester has to show that the records are sought in furtherance of scientific research. Information necessary to support a claim of being categorized as an educational or non-commercial scientific institution requester will be provided by the requester.

(3) **Representative of the news media.** A representative of the news media is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. Freelance journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the requester's past publication history can be considered also. These requesters will be charged for the cost of reproduction only, excluding charges for the first 100 pages. To be included in this category, a requester must meet the criteria described above, and the request must not be made for commercial use. A request for records supporting the news dissemination function of the requester will not be considered to be a request that is for commercial use.

(4) **All other requesters.** Any requester that does not fit into any of the categories described above will be charged fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

b. Any FOIA requester may ask for a waiver or reduction of the fees for processing a request. Records will be furnished without any charge or at a reduced charge, if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Requests for reduction or waiver of the fees will be considered in view of the criteria established in 38 CFR 1.555(f). Fees will not be charged if the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If it is determined that the fees are likely to exceed $25, the requester will be notified of the estimated amount of fees, unless the requester has indicated in advance a willingness to pay fees as high as those anticipated. A requester may be requested to make an advance payment of fees when the allowable charges to be assessed are likely to exceed $250, or when a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing). Where the requester has a history of prompt payment of FOIA fees and the charges to be assessed are likely to exceed $250, the requester will be notified of the likely charge and asked to provide satisfactory assurance of full payment. Where allowable charges are likely to exceed $250, a requester with no history of payment will be required to make payment of an amount up to the full estimated charges.

9.05 TIME LIMITS FOR COMPLIANCE WITH A FOIA REQUEST

a. A request for records received at a health care facility will be promptly referred for action to the facility's FOIA Officer. The requester must be notified within 10 workdays after receipt of the request whether the request will be granted or denied. The 10 day time limitation begins upon receipt of the request by the office which is responsible for replying. Once the requester has been notified of a determination to comply with the request, the document(s) will be made available promptly. A response which denies a request for information must include the statutory authority (exemption) which provides for the withholding (e.g., 5 U.S.C. 552(b)(6) disclosure would constitute a clearly unwarranted invasion of personal privacy) as well as the identification of the data being withheld and some explanation of why the records or information involved qualify for the exemption being taken. The requester will also be advised of the right to appeal an adverse determination to the General Counsel (02), Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, DC 20420. When FOIA exemptions are invoked, the exempted portions of the record will be deleted and the segregable nonexempt portions will be released.

b. In unusual circumstances, extensions of not more than 10 workdays may be granted in advising a requester whether VA will grant or deny the request when one of the following conditions exist:

(1) There is a need to search for and collect the requested records from field facilities that are separate from the office processing the request;

(2) There is a need to search for, collect and examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) There is a need for consultation with another agency having substantial interest in the determination of the request or among two or more components of VA having substantial subject-matter interest therein.

c. If an extension of time is required to respond to a request, the requester must be advised in writing of the extension, the reasons for the extension, and the date on which a determination is to be provided.

9.06 EXHAUSTION OF REMEDIES

The requester must comply with the administrative procedures established by the FOIA regarding the initial, as well as the appellate request. Any person who makes a FOIA request is deemed to have exhausted all other administrative remedies if VA fails to comply with the time limitations for response to an initial or appellate request. A requester may file a lawsuit in a Federal district court when VA does not meet the time limitations imposed by the FOIA.

9.07 EXEMPTIONS FROM PUBLIC ACCESS TO VA RECORDS

a. Under subparagraph (b) of the FOIA, 5 U.S.C. 552, there are nine exemptions which permit withholding of certain information from disclosure (see 38 CFR 1.554(a)). The nine exemptions are discretionary, that is, records or information are not required to be withheld if an exemption applies except where one or more confidentiality statutes, some of which are discussed in this Chapter, requires withholding of a record or information. It is the general policy of VA to disclose information from Department records to the maximum extent permitted by law. There are circumstances, however, when a record should not or cannot be disclosed in response to a FOIA request. When such an occasion arises, the FOIA permits records or information, or segregable portions thereof, to be withheld under one or more of the exemptions. These exemptions should be invoked in denying a request only after careful review and consideration of all factors surrounding the request. The exemptions are:

(1) **Exemption (1)**

(a) This exemption allows VA to exempt from mandatory release national defense or foreign policy information which has been properly classified pursuant to an appropriate Executive Order. As stated in MP-1, Part I, Chapter 5, which includes VA policy on the handling of classified information, VA does not have original classification authority. "Original classification" is the initial determination that information requires protection against unauthorized disclosure in the interest of national security, and a designation of the level of classification. Requests for records that were originated and originally classified by another agency should be referred to the originating agency for processing and the requester notified of the referral.

(b) Requests for information that was previously classified by an original classification authority that is incorporated, paraphrased, restated, or generated in new form in a VA document and has received a derivative classification (a determination that information is in substance the same as information that is currently classified, and a designation of the level of classification) will be processed as follows. The classified information will be deleted and the FOIA Officer and the office that generated the document will make a determination as to the extent any or all of the remainder of the information can be disclosed. The information will be redacted and/or disclosed accordingly. A

redacted version of the disclosed document which includes the classified information will be referred to the originating agency for processing and the requester will be notified of the referral. Also, the requester will be advised of all withholding of information, the exemption(s) which provides for such withholdings, and that the denial may be appealed to the General Counsel.

(2) **Exemption (2).** This exemption has been interpreted to encompass two distinct categories of information; internal matters of a relatively trivial nature (material which is so mundane or trivial that the public would not have legitimate interest in the information), and more substantial internal matters the disclosure of which would allow circumvention of a statute or agency regulation (e.g., manuals and documents relating to law enforcement investigations, instructions, procedures and techniques).

(3) **Exemption (3).** This exemption directly involves the application of other statutes which, by their terms, require that certain information must be withheld, or refers to particular types of matters to be withheld. Examples of statutes which may be cited under this exemption are 38 U.S.C. 3301 (VA claimant name and address information only), 3305 (medical quality assurance information), and 4132 (drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia medical treatment information). (See par. 9.08.)

(4) **Exemption (4).** This exemption concerns privileged or confidential trade secrets and commercial or financial information obtained from parties outside the Government. For such information to be subject to withholding under this exemption, it must be shown that (1) disclosure is likely to impair the Government's ability to obtain necessary information in the future; or (2) there is likelihood that release will cause the submitter of the information substantial competitive harm. Paragraph 9.09 provides procedures to be followed when responding to FOIA requests for business information.

(5) **Exemption (5).** This exemption provides that VA records and documents need not be disclosed if they are "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The words "memorandums" and "letters" are interpreted quite broadly and include virtually any document VA produces, including reports, audits, records, contract reports, forms, etc.

(a) Protected by this exemption is material which is covered by the litigation attorney-client privilege, the attorney work-product privilege, and the deliberative process privilege. The last privilege protects predecisional VA records and documents created as part of the deliberative decision-making process. If a document constitutes or reflects a VA decision or final opinion, it is clearly not predecisional and so not exempt under this privilege. The predecisional character of a document is not lost simply because a final decision has been made on the matter. Information may be deleted from documents which are created as part of the deliberative decision-making process which reflect an employee's advice, recommendations, opinions, or proposals so long as such advice, recommendations, opinions or proposals remain predecisional and are not "incorporated by reference" into final Department decisions. ("Incorporated by reference" means that the document which reflects the final decision on the matter makes specific reference to the predecisional document as the source or basis for the decision, or that the final decision is recorded directly on the predecisional document.) Predecisional documents may lose their exempt status under this exemption if VA chooses expressly to adopt or to incorporate by reference such documents in a final

decision or opinion, in statements of policy or interpretations adopted by VA, or instructions to staff that affect a member of the public.

(b) In general, it is very difficult to apply this exemption to protect predecisional factual information; ordinarily, factual material must be disclosed if the only withholding basis for consideration is the deliberative process privilege. However, factual information may be protected where it has been selected out of a larger group of factual information and this selecting out is deliberative in nature. It may also be withheld under this privilege where the factual material is so inextricably connected to the deliberative process that revealing the factual material would be tantamount to revealing the Department's deliberations. In actual application of this exemption, the requested document must be reviewed and the releasable factual information segregated by blocking out the exempt information. (Facts which are so intertwined with exempt portions may be exempted from release where it is not possible, following the editing of withholdable material, to leave in meaningful portions of factual information.)

(6) **Exemption (6).** This exemption allows for the withholding of personal information that may be contained in any Department record including personnel, medical files and similar files, where the disclosure would constitute a clearly unwarranted invasion of personal privacy. This exemption should be considered for information of a personal nature regardless of what type of file it is located in, or, even if it exists in a tangible form but not in a file.

(a) Application of this exemption requires a balancing between an individual's right to privacy and the public interest in the material requested. An employee's job title, grade and salary are open to public review, while home address information generally is not. The first step in the Exemption 6 balancing process requires an assessment of the privacy interests at issue. In some instances, the disclosure of information may involve little or no invasion of privacy because no expectation of privacy exists. Once it has been determined that a privacy interest is threatened by disclosure, the second step in the balancing process requires an assessment of the public interest in disclosure. The measure of the public interest is whether the disclosure of the information in question sheds light directly on the Department's performance of its statutory duties. Information that reveals little or nothing about the Department's own conduct does not meet this public interest standard. If the information meets this standard then, for purposes of Exemption 6, it must be disclosed unless such disclosure would constitute a clearly unwarranted invasion of personal privacy. Intimate, personal details of an individual's life, for example, have been withholdable even when there is some public interest, of the type discussed above, in that information. Individuals who seek records for their own benefit are not acting to further a public interest.

(b) Where personal information, such as names or personal identifiers, is contained in records that would otherwise be releasable, such individual names, other identifiers and information which would reasonably tend to identify them, may be blocked out, citing this exemption, where there is not an overriding public interest in disclosing such names or identifiers. For application of this exemption to records protected by the PA, see paragraph 9.08d.

(7) **Exemption (7).** This exemption provides that VA may refrain from disclosing investigatory records and documents which are prepared for law enforcement purposes

but only to the extent that disclosure of the records or information:

(a) Could reasonably be expected to interfere with enforcement proceedings;

(b) Would deprive a person of a right to a fair trial or an impartial adjudication;

(c) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(d) Could reasonably be expected to disclose the identity of a confidential source (including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis);

(e) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(f) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) **Exemption (8).** This exemption concerns Federal agencies involved in the regulation of financial institutions and is not applicable to VA operations.

(9) **Exemption (9).** This exemption concerns geological and geophysical information and has no direct application to VA.

b. All requested records must be reviewed, on a line by line basis, prior to disclosure. Appropriate withholding and/or deletion (redacting) of information will be made in accordance with the exemptions. All segregable portions of a record will be provided to any person who requests it. A request for records will not be denied solely on the basis that a request concerns a large amount of documents which will entail a burdensome search or time-consuming review of material for appropriate withholding of information.

c. A copy will be retained of any redacted records which are disclosed. This copy, and a copy of the unredacted records, will be made available for review in the event of an appeal of the decision to withhold information from disclosure.

9.08 FOIA EXEMPTION STATUTES

The following statutes, with the exception of 5 U.S.C. 552a (the Privacy Act), must be considered in determining whether requested information must be withheld under exemption (3) or released.

a. **Title 38, United States Code, Section 3301** applies to all claimants' records and lists the special circumstances in which identifying information on claimants may be released. The only claimant or patient information withholdable from a FOIA request under exemption 3 are the names and addresses of veterans and dependents.

b. **Title 38, United States Code, Section 3305** generally prohibits disclosure of certain medical quality assurance records which are identified in 38 CFR 17.500 and following.

c. **Title 38, United States Code, Section 4132** prohibits disclosure of medical record information maintained by VA on individuals who have applied for, been offered, or have participated in any program or activity relating to drug and alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia. The disclosure provisions for these records are found in 42 CFR 2.1-2.67 (52 FR 21796, June 9, 1987) and Section IV of this chapter.

d. **Title 5, United States Code, Section 552a, The Privacy Act.** This statute controls disclosures from records which pertain to individuals which are filed and retrieved by an individual identifier, such as a name or Social Security number. This statute may not be cited under exemption 3, however, as the basis for withholding information. When the disclosure of personal PA record information would constitute a clearly unwarranted invasion of personal privacy, under the balancing test described in paragraph 9.07a(6), FOIA exemption 6 should be cited as the basis for withholding the information from disclosure. Similarly, under the same balancing test, when disclosure would not constitute an invasion of personal privacy, PA information must be disclosed under FOIA.

9.09 FOIA REQUESTS FOR RECORDS CONTAINING BUSINESS INFORMATION

a. During the conduct of its business, VA acquires proprietary information and trade secrets from businesses, corporations, or entities. The information is usually given freely by businesses so that VA can accomplish its mission. For example, business information will be provided in response to an Agency Request for Proposal for services, equipment, or other goods and services. Once acquired, VA has a responsibility to protect sensitive business information. It may do so by withholding business information under FOIA exemption number 4 (5 U.S.C. 552(b)(4)).

b. When documents provided by a business submitter that include confidential commercial information are requested under the FOIA, and it is determined that the health care facility may be required to disclose the records, the FOIA Officer will so notify the record submitter. The notification will be sent by certified mail, return receipt requested, and will describe the exact nature of the record(s) requested or will provide to the submitter copies of the record(s) or portions thereof that contain the requested confidential commercial information. The notification will advise that the submitter or its designee may object to the disclosure of any specified portion of the record and to state all grounds upon which disclosure is opposed. The submitter will be given 10 working days in which to submit a written objection to the disclosure. The submitter or designee may object to the disclosure of any specified portion of the record and must identify the specific record or portion of the records that should not be disclosed, state the grounds upon which disclosure is opposed, and explain in detail why disclosure of the specified records could reasonably be expected to cause substantial competitive harm.

c. At the same time the submitter is provided notification, the FOIA Officer will notify the FOIA requester that the submitter has been offered an opportunity to comment. The requester will be notified of the anticipated date on which a decision on disclosure will be made.

d. Prior to making a determination on the disclosure of the information or records, careful consideration will be given to all grounds for nondisclosure that are presented for consideration by the submitter. Because of the commercially-sensitive information which may be involved, where there is any difference of opinion about disclosure between

the information submitter and VA personnel, the facts are to be discussed with District Counsel prior to taking further action on the request.

e. When a determination is made that disclosure of the confidential commercial information would cause substantial competitive harm, the requester will be advised of the decision to withhold the harmful portions from disclosure. The requester must be provided with a copy of any records or portion of a record that is requested and that is not commercially sensitive or otherwise exempt from required disclosure under any of the other FOIA exemptions, 5 U.S.C. 552, Sections (b)(1) through (9). The confidential commercial information will be withheld under FOIA exemption (b)(4), 5 U.S.C. 552(b)(4). If any record request is denied or partially denied, the requester will be advised that the denial may be appealed to the General Counsel.

f. In all instances where the submitter has expressed objections to the disclosure of the record and the determination is made by VA personnel that disclosure will take place, the FOIA Officer will provide the submitter with a written statement explaining why the submitter's objections are not sustained, a description or copy of the information or records that will be disclosed, and the specified disclosure date. The disclosure date will not be less than 10 working days from the date the notice is mailed. This notice will allow the submitter the opportunity to take an appeal or to consider any judicial action that might be taken to prevent release of the records. Notification of the final decision will also be sent to the requester.

g. In any case where a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, the FOIA Officer will promptly notify the submitter.

9.10 COORDINATION OF RELEASES WITH DISTRICT COUNSEL

In any case where a FOIA request involves matters or subjects involved in ongoing or anticipated litigation, health care facility personnel will coordinate the request with the District Counsel. If a request involves matters pertaining to ongoing litigation, the District Counsel must be informed of the request to ensure coordination of the VA's position in the litigation with any release of documents. If no litigation is pending, but can be reasonably anticipated in the future, the FOIA request should be reviewed with the District Counsel in light of that likelihood. In all such cases, records should be maintained that identify the documents released pursuant to the request. Discretionary disclosures should be coordinated with the District Counsel rather than relying solely on the existing FOIA release procedures.

9.11 ANNUAL REPORT OF COMPLIANCE WITH FOIA

The FOIA requires each agency to submit to the Congress a report on or before March 1 of each year of its activities and efforts to administer the FOIA during the preceding calendar year. Each facility is required to submit an annual report on VA Form 70-4943, Annual Report of Compliance With FOIA, to the Director, Office of Information Resources Policies (72) for use in compiling the Department report. The information will be reported for the preceding calendar year no later than the 15th workday of January. The instructions for the preparation of the health care facility annual FOIA report are contained in MP-1, part II, chapter 35.

9.12-9.14 (Reserved.)

SECTION II. PA (PRIVACY ACT) OF 1974

9.15 GENERAL

a. The PA provides that the collection of information about individuals will be limited to that which is legally authorized, relevant, and necessary. All information will be maintained in a manner which precludes unwarranted intrusion upon individual privacy. Information will be collected directly from the subject individual to the extent possible. At the time information is collected, the individual will be informed in writing of the authority for collecting the information, whether providing the information is mandatory or voluntary, the purposes for which the information will be used, and the consequences of not providing the information. (The information collection requirements of the Paperwork Reduction Act will also be met.) Information in VA records which are used by the Department in making any determination about any individual will be maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. Prior to disclosing information from an individual's record, reasonable efforts will be made to assure that the records or information to be disclosed meet these requirements.

b. Each health care facility Director will ensure that appropriate administrative, technical, and physical safeguards are established to ensure the security and confidentiality of PA information and records and to protect against any anticipated threats or hazards to their security or integrity which would result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained. All health care facility employees involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, will review the provisions of the PA, the FOIA, and sections 3301, 3305, and 4132 of Title 38 as well as 38 CFR 1.500-1.527, 1.550-1.559, 1.575-1.584, 17.500 and following and 42 CFR 2.1-2.67 (52 FR 21796). Each health care facility will publish a facility policy governing the release of record information to include the identification of each PA system of records that is maintained at the facility and the facility program official who is responsible for the records. The policy will be distributed to all employees who have access to PA information or records. All employees who have access to these records will be instructed on an ongoing basis on the requirements of the PA, VA confidentiality statutes, and the regulations that implement these statutes. At a minimum, instruction will be provided at the time of employment and on an annual basis thereafter. All employees shall conduct themselves in accordance with the rules of conduct concerning the disclosure or misuse of information in the VA Standards of Ethical Conduct and Related Responsibilities of Employees, 38 CFR 0.735-15.

c. All groups of VA records from which information is retrieved by the name of an individual or some personal identifier, such as Social Security number, must be described and published in the Federal Register in a VA Privacy Act System of Records. VA Manual MP-1, part II, chapter 21, appendix B, "Notice of Systems of Records," is an inventory listing of the systems of VA records that have been identified as subject to the Privacy Act of 1974. Each system notice includes the title of the individual (System Manager) who is responsible for the records. Appendix A of that manual sets forth the reporting requirements that must be observed whenever a new system of VA records is to be established or an existing system altered. Information about individuals that is retrieved by a personal identifier may not be collected or maintained until proper notifications are given to the Congress, the Office of Budget and Management, and announced for public comment in the Federal Register.

9.16 DEFINITIONS

a. **Individual.** For the purpose of this section, a citizen of the United States or an alien lawfully admitted for permanent residence. The term includes parents acting on behalf of minors and court appointed guardians for individuals who have been declared to be incompetent. The PA does not apply to records concerning deceased persons.

b. **Legal Guardian.** A person appointed by a court of competent jurisdiction to maintain and care for an individual (and not just guardian of the estate or property of the individual) who has been declared to be incompetent due to physical or mental incapacity or age. A VA federal fiduciary is not a "legal guardian" for Privacy Act purposes.

c. **Maintain.** For the purpose of this chapter, "maintain" includes maintain, collect, use, and disseminate.

d. **Personnel.** For the purpose of this chapter, the term VA personnel includes those officers and employees of the Department; consultants and attendings; WOC (without compensation); contractors, others employed on a fee basis; medical students and other trainees; and uncompensated services rendered by volunteer workers, excluding patient volunteers, providing a service at the direction of VA staff.

e. **Privacy Act Officer.** Normally, the Chief, Medical Administration Service is designated as the facility Privacy Act Officer.

f. **Record.** Any item, collection, or grouping of information about an individual that is maintained by VA, including but not limited to education, financial transactions, medical history, and criminal or employment history that contains the name, or an identifying number, symbol, or other identifying particular assigned to the individual, such as finger or voice print or a photograph. "Records" include information that is stored in paper records, computers, minicomputers, personal computers, or word processors.

g. **Routine Use.** A properly promulgated Privacy Act "routine use" permits the disclosure of information from a record without the individual's written consent, when the disclosure is compatible with the reason for which the information was collected. The routine use provision is a discretionary authority and does not compel disclosure. A routine use must be published in the Federal Register at least 30 days before a disclosure is made pursuant to the routine use. Each system of records listed in the records inventory includes a "routine use" section (see MP-1, part II, chapter 21, appendix B.)

h. **System Manager.** The individual designated responsibility for a system of records as identified in the system description and published in MP-1, part II, chapter 21, appendix B. The health care facility official with the program assignment is responsible for the maintenance of the records at the facility.

i. **System of Records.** A group of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to an individual. A record in a system of records must contain two elements, a personal identifier and at least one item of personal information. If a retrieval of personal information is possible, but not actually done, or if it depends on memory, the collection of records is not a system of records. However, creating a retrieval or cross index, arranged by personal identifier for randomly filed records, makes

that record collection a system subject to the provisions of the PA. Further, when information in fact is retrieved by a personal identifier, a system of records subject to the Privacy Act comes into existence (assuming no already properly established system covers the new retrieval activity). Without prior publication of a system notice, such a system would be an illegal system of records and personnel operating it would be exposed to criminal penalties.

9.17 ACCESS

a. Individuals may request in writing to have access to, to correct or amend, or to obtain a copy of their PA record. Individuals do not have to state a reason or provide justification for wanting to see or to obtain a copy of the records. All such requests will be promptly delivered to the appropriate System Manager. In addition to requests received from individuals by way of direct mail or in person, requests may be received by mail referral from another agency or VA office. When a request is for records that have been transferred to another VA facility, the request will be forwarded to the receiving facility for appropriate action and the requester will be notified of the referral. The requests will be time/date stamped upon receipt and a control will be established to assure compliance with the 10-day time standard provision contained in MP-1, part II, chapter 21, paragraph 5a. VA Form 70-5572, Accounting of Records/Information Disclosure under Privacy Act, may be used for this purpose.

b. The time standard policy provides that facilities will normally conclude all actions on requests within 10 days of receipt (excluding Saturdays, Sundays and legal holidays). If unable to do so, an acknowledgment of mailed requests will be sent within 10 days of receipt. VA Form Letter 70-17, Postal Card Acknowledgment of Request Under the Privacy Act, may be used for this purpose except when circumstances in a particular case warrant a specially written letter. When a request for access to a record is being granted by a health care facility, all action will normally be completed within 30 working days from the date the request was initially received. When, for good cause shown, a facility is unable to provide access to a record within the 30-day period, the individual will be informed in writing as to the reasons why access cannot be provided within 30 days and when it is anticipated that the record will be made available for review.

c. When individuals appear in person at a VA health care facility and request in writing access to their records and provide the required information and verification of identity, they will be advised at that time whether access can be granted. When immediate access cannot be granted (for such reasons that the record may contain sensitive information requiring review by a physician to ascertain that release will not adversely affect the individual's physical or mental health, the need to retrieve the record from a NARA Records Center, time needed to make the record comprehensible to an individual, e.g., reproducing magnetic tape records in a hard copy form readable by the individual), necessary arrangements will be made for a later personal review, or if acceptable to the individual, the furnishing of copies by mail.

d. Mailed requests for access to individual records will be referred to the System Manager who will determine whether access will be granted. If additional information is required before a request can be processed, the individual will be so advised. If it is determined that a request for access to records will be granted, the individual will be advised by mail that access will be given at a designated location in the facility or a copy of the requested record will be provided by mail if the individual indicated that a copy was acceptable.

e. In granting access to an individual's record, the System Manager shall take such steps as are necessary to prevent the unauthorized disclosure at the same time of information pertaining to individuals other than the person making the request or of other information that does not pertain to the individual.

f. Policy contained in 38 CFR 1.577(a) indicates that, except as otherwise provided by law or regulation, individuals upon request may gain access to their VA record or to any information pertaining to them which is contained in any system of records maintained by VA. In view of this policy, access will be granted except under extraordinary circumstances. When a request for access to a record is denied, the health care facility Director will promptly notify the individual of the decision as provided in paragraph 9.19.

g. Title 38, Code of Federal Regulations, section 1.577(a) and MP-1, part II, chapter 21, paragraph 4c provide that a person of the individual's own choosing may accompany the individual to review a record. A written statement is required from the individual authorizing discussion of the record in the accompanying person's presence. VA Form 07-5571, Authorization to Disclose a Record in the Presence of a Third Party, should be used for obtaining the required signed statement. If the record includes information that pertains to treatment for drug or alcohol abuse, infection with the human immunodeficiency virus or sickle cell anemia, a written authorization is also required which meets the requirements of paragraph 9.80.

h. A VA employee will be present at all times during any personal review of a record to ensure the integrity of the record.

9.18 VERIFICATION OF IDENTITY

a. Individuals who request information from their PA records must provide sufficient information to verify their identity and to provide assurance that they are not improperly given access to records pertaining to someone else. These requirements should be kept to a minimum so long as there is reasonable assurance that a person is not improperly given access to, or information from, another person's record. When an individual appears in person, the requirements should be limited to various identification forms which an individual is likely to have available, such as a driver's license or employee identification card. When individuals request by mail copies of information from their records, verification of identities may consist of providing social security numbers and the signatures and addresses compared with the record information. These minimum requirements may be exceeded when processing requests pertaining to sensitive information of the type described in paragraph 9.19.

b. Individuals who cannot provide suitable identification to substantiate their identity, may be requested to provide signed statements asserting their identity and stipulating that they are aware of the criminal penalties for seeking access to another person's record under false pretenses (see 38 CFR 1.576(c)(3)).

9.19 SENSITIVE MEDICAL AND OTHER INFORMATION

a. Sensitive information is information which may have a serious adverse effect on the individual's mental or physical health if disclosed to the individual. Such information may contain implications requiring explanation or interpretation by an intermediary, to assist in its acceptance and assimilation in order to preclude an adverse impact on an individual's mental or physical health.

b. When individuals request access to their records which are maintained at a VA health care facility which includes medical, social, and/or psychological information, using guidelines established in accordance with paragraph 9.37c., the System Manager or designee will review the record to determine whether the medical and/or psychological information could cause harm to the individual. If, upon review of the record, the System Manager or designee concludes that the information could cause harm, the request and related record will be referred to a designated physician or psychologist, as appropriate, to determine if the record should be disclosed directly to the individual or if a physician should discuss the record/information with the individual. If it is determined that a physician does not need to discuss the record with the individual, then the individual will be permitted to review the record or have copies made.

c. If the designated facility physician who reviews a record believes that disclosure of the medical and/or psychological information directly to an individual could have an adverse effect on that individual, the System Manager will advise the individual that the information may be disclosed to a private physician or professional person selected by the individual, and arrange for the individual to report to a designated location in the facility for discussion of the record with a designated VA physician. In those extraordinary cases where a careful and conscientious explanation of the information considered harmful in the record has been made by a VA physician and where it is still the physician's professional medical opinion that physical access to the information could be physically or mentally harmful to the individual, physical access may be denied. Such a denial situation should be an unusual, very infrequent occurrence. Where denial of a request for physical access is made, the justification for making the denial will be fully documented by the physician in the record specifically stating the rationale for considering the information medically injurious. The physician's opinion that physical access should be denied will be reviewed by the health care facility Director. If the Director, upon the advice of the Chief of Staff, determines that physical access will not be granted, the individual making the request will be promptly advised of the decision, the reasons for the denial of the request, and that the denial may be appealed to the General Counsel (02), Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, DC 20420, as provided in 38 CFR 1.577(d). The individual will be furnished a copy of any requested portion of the record that is nonsensitive.

d. When a VA regional office receives a request which involves medical information in a claims folder and the responsible regional office personnel believe that the information is sensitive, the request and related record will be referred to the appropriate VA health care facility for decision concerning the appropriate method of disclosure. The health care facility is responsible for completion of the medically indicated disclosure action.

e. When a request is referred to a private physician or other professional for disclosure in accordance with paragraph c. above, the physician will be sent a covering letter indicating in general terms the sensitive nature of the information. The physician or other professional will also be apprised of the medical-legal rationale behind receipt of the information so that any safeguards can be taken which are believed to be necessary to protect the individual's physical or mental health.

9.20 REQUEST FOR AMENDMENT OF RECORDS

a. An individual may request amendment of any record retrieved by his or her name contained in a VA system of records as provided in 38 CFR 1.579. The right to seek

amendment of records under the PA is a personal right of the individual to whom the record pertains. The request should be mailed or delivered to the facility that maintains the record.

b. The request must be in writing and adequately describe the specific information the individual believes to be inaccurate, incomplete, irrelevant, or untimely; and the reason for this belief. The individual will be requested to clarify a request which lacks specificity in describing the information for which amendment is requested in order that a responsive decision may be reached.

c. A request for amendment of records will be delivered to the System Manager for the concerned system of records where it will be time/date stamped and placed under control. In reviewing requests to amend or correct records, the System Manager will be guided by the criteria set forth in 38 CFR 1.578. That is, VA will maintain in its records only such information about an individual as is relevant and necessary to accomplish a statutory purpose of VA, as required by statute or executive order of the President, and that such information also is accurate, complete, timely, and relevant for VA purposes. These criteria will be applied whether the request is to add material to a record or to delete information from a record. When an individual requests amendment of clinical information in a medical record maintained at a health care facility, the System Manager will refer the request and related record to a physician(s) designated by the health care facility Director to determine if the record should be amended.

d. A request to amend a record will be acknowledged in writing within 10 workdays of receipt. If a determination has not been made within this time period, the System Manager will advise the individual when to expect to be advised of the action taken on the request. The review will be completed as soon as possible, normally within 30 workdays from receipt of the request. If the anticipated completion date indicated in the acknowledgment cannot be met, the individual will be advised in writing of the reasons for the delay and the date action is expected to be completed.

e. When a request to amend a record is approved by the health care facility Director, the System Manager will take the following actions:

(1) Any information to be deleted will be made illegible. Any new material will be recorded on the original document. The words "Amended-Privacy Act" will be recorded on the original document. The new amending material may be recorded as an addendum if there is insufficient space on the original document. The original document must clearly reflect that there is an addendum and care must be taken to insure that a copy of the addendum accompanies the copy of the original document whenever it is used for disclosure purposes. The amendment will be authenticated with the date, signature, and title of the person making the amendment.

(2) The individual making the request for amendment will be advised that the record has been amended and provided with a copy of the amended record. VA Form Letter 70-18 may be used for this purpose.

(3) If the record has been disclosed prior to amendment, the recipient will be informed of the correction and provided with a copy of the amended record. VA Form Letter 70-19 may be used for this purpose.

f. When a request to amend a record is denied, the health care facility Director will promptly notify the individual making the request of the decision. The written

notification will state the reasons for the denial, advise the individual that the denial may be appealed to the General Counsel, and include the procedures for such an appeal. The written appeal should be mailed or delivered to the Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, DC 20420. The letter of appeal should state clearly the reasons why the denial should be reversed and include any additional pertinent information.

9.21 APPEAL OF INITIAL ADVERSE DEPARTMENT DETERMINATION ON CORRECTION OR AMENDMENT

a. Any person notified of a denied request, in whole or in part, for correction or amendment of personal records may appeal the adverse determination to the General Counsel, in accordance with the authorities contained in 38 CFR 1.579(c).

b. When an individual appeals the initial adverse decision and the General Counsel or Deputy General Counsel finds that the adverse determination should be reversed, the individual and the health care facility will be notified of the decision. Upon receipt of the notification, the System Manager will amend the record as instructed in the notification. The procedures established in paragraph 9.20e will be followed.

c. If the General Counsel or Deputy General Counsel sustains the adverse decision, the individual will be advised in the appeal decision letter of the right to file a concise statement of disagreement with the health care facility that made the initial decision.

d. A statement of disagreement shall concisely state the basis for the individual's disagreement. Generally, a statement should be no more than two pages in length except where an individual may submit a longer statement if it is necessary to set forth the disagreement effectively. Unduly lengthy materials will be returned to the individual by the System Manager for appropriate revisions before they become a permanent part of the individual's record. However, if the individual insists upon the information becoming part of the record, the information will be added to the record.

e. When an individual files a statement of disagreement, the record about which the statement pertains will be clearly annotated to note which part of the record is disputed. When disclosures are made of the disputed record, a copy of the statement of disagreement will be provided. If it is determined appropriate, a copy of a concise statement of the VA's reasons for not making the amendments requested will also be provided.

9.22 DISCLOSURE OF AN INDIVIDUAL'S PA RECORD TO THIRD PARTIES

a. The Department conditions on disclosures from a PA record to other than the subject of the record under the exceptions to the PA, 5 U.S.C. 552a(b)(1) to (b)(11), are contained in 38 CFR 1.576(b)(1)-(11). (Any disclosure of records or information from VA beneficiary records also must be authorized under the provisions of Section 3301, Title 38, United States Code, before disclosure is permitted. The application of Section 3301 is discussed generally throughout this chapter.) Additionally, to the extent that a contemplated disclosure involves information protected by 38 U.S.C. Section 4132 (treatment or other activity related to drug or alcohol abuse, sickle cell anemia and AIDS or HIV testing) authority in addition to the PA and Section 3301 must be present for a lawful disclosure. In this regard see Section IV. Information will not be disclosed from

any record in a system of records except by the written request of or prior written consent of the individual by whose name or personal identifier the record is retrieved unless the disclosure is:

(1) To VA employees who have a need for the information in the performance of their duties.

(2) Required under the Freedom of Information Act, 5 U.S.C. 552.

(3) For a routine use. This allows for release of information when such a release is compatible with the purpose for which the information was collected. A routine use serves to provide notice to individuals on whom information is maintained of how such information may be used. The public is given notice of the routine use by publication in the Federal Register;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to Title 13, United States Code;

(5) To a recipient who has provided VA with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable (the request must state the purpose for requesting the records and certify that they will only be used as statistical records);

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or for evaluation by the administrator of the National Archives and Records Administration or designee to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to VA specifying the particular portion of the record desired and the law enforcement activity for which the record is sought. A request may be signed by an official other than the head of the agency provided that individual has been specifically delegated authority to make requests for information under the authority of 5 U.S.C. 552a(b)(7). A general delegation of authority is not sufficient to authorize an individual to make requests for information under this disclosure authority. The delegation may only be to an official of sufficient rank to ensure that the request for the records has been the subject of a high level evaluation of the investigatory need for the information versus the invasion of personal privacy involved. The requester must supply a copy of the written delegation of authority or provide a reference to the delegation such as a CFR number. Questions as to whether a requester qualifies as the "head of an agency" will be referred to the appropriate District Counsel for resolution. Under this disclosure provision, information may be disclosed from Privacy Act records for law enforcement purposes to State, county and local police departments and such Federal agencies as the Federal Bureau of Investigation and the U.S. Secret Service. Written requests for information to be used in an investigation from such law enforcement entities must state the law enforcement purpose for which the record is sought as well as identify the particular record requested. Generally, a blanket request for all records pertaining to an individual would not qualify for release under this provision. A request for records pertaining to an individual or a group of individuals must be specific as to the

type of records sought, i.e., records for certain types of injuries, for certain time periods, etc.;

(8) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual. The individual whose PA records are involved need not necessarily be the individual whose health or safety is in danger. A notification of the disclosure must be mailed to the last known address of the subject of the record;

(9) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee (see par. 9.23);

(10) To the Comptroller General, or any authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) Pursuant to the order of a court of competent jurisdiction (Subpoenas signed by anyone other than the judge of a court do not provide authority for disclosure under this PA exception.); or

(12) To a consumer reporting agency in accordance with section 3711(f) of Title 31.

b. Under the provisions cited above, disclosure is permitted without the signed consent of the individual. Disclosure is not mandatory under these provisions, and in questionable situations, the signed consent of the individual should be obtained.

c. The notification and time standards provisions of paragraph 9.17 apply to requests from third parties.

d. With the signed consent of the individual, information will be disclosed only to the extent authorized by the written consent. Information that is disclosed under the exceptions described in subparagraph a will be limited to the information that is needed to satisfy the purpose of the request and which is authorized by the exception.

e. A disclosure may be either the providing of a copy of a record, or part thereof, or the granting of access to a record. Normally, information from a record will be disclosed to an authorized third party by abstracting the relevant information or providing a copy of the document that contains the relevant information. When granting access to a record to a third party, access must be limited to that information authorized by the individual's written request or consent, or that information which is authorized under the exceptions described above.

9.23 DISCLOSURE OF AN INDIVIDUAL'S PA RECORD TO MEMBERS OF CONGRESS

a. **Processing Requests for Information From a Member of Congress, Acting in an Individual Capacity on Behalf of, and at the Request of the PA Record Subject**

(1) Information may be disclosed from an individual's PA record to a Congressional office when responding to an inquiry from the Congressional office that is made at the request of the individual.

(2) If information being disclosed is considered potentially medically or psychologically harmful if disclosed to the individual, the Member will be advised of the medical

determination and that under 38 CFR 1.577(d) the information is releasable to the individual only through a physician or other professional of the individual's choice or a VA physician. For this purpose, the individual should contact the appropriate System Manager of the health care facility where the individual's records are maintained.

(3) If the Member requests information from drug or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia treatment records and the individual's specific written consent to release this information has not been obtained (see par. 9.80), the Member should be advised that the request concerns subject matter the disclosure of which is prohibited by Federal statute and therefore is not provided. The Member will not be advised that a special written consent for disclosure of the information is required or that 38 U.S.C. 4132 prohibits disclosure of the information. When appropriate, the patient will be contacted for the special consent.

b. **Processing Requests for PA Record Information From a Member of an Oversight Committee or Subcommittee**

(1) Information may be disclosed from a PA record to a Member of the Veterans' Affairs Committee or Subcommittee of the House of Representatives or the United States Senate (or Chairman or Member of a Congressional Committee or Subcommittee having oversight jurisdiction extending to that information provided the Chairman or Member is making the request on behalf of the Committee or Subcommittee, e.g., House Government Operations Committee, Senate or House Appropriations Committees, Senate Governmental Affairs Committee) without the individual's request or consent when the request for information is made as part of their Committee oversight functions. When PA record information is provided, the Member should be advised that the PA information is being released for official purposes only and that given its private, confidential nature, the information should be handled with appropriate sensitivity. If the request does not involve Committee or Subcommittee oversight but merely "casework" of the Member, it should be processed in accordance with the guidance provided in paragraph 9.23a.

(2) If it is determined that information about an individual being released for oversight purposes to a Member of the House or Senate Veterans' Affairs Committee (or Chairman or Member of another oversight committee or subcommittee) is sensitive under 38 CFR 1.577(d) (see par. 9.19), the Member will be advised that it has been medically determined that information being disclosed to him or her could be harmful to the individual and therefore should not be released directly to the individual.

(3) If the information being released for oversight purposes to a Member of the House or Senate Veterans' Affairs Committee (or Chairman or Member of another oversight committee or subcommittee) contains medical treatment information related to drug or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia, the Member should be advised that the information has been disclosed to them as a Member of the (House or Senate) Veterans' Affairs Committee (or other oversight committee or subcommittee) for an official committee program evaluation purpose from records whose confidentiality is specially protected by Federal Law (38 U.S.C. section 4132). Because this statute prohibits any further disclosure of the information without the specific written consent of the person to whom it pertains, the Member should be advised that the regulations VA is following prohibit further disclosure without the prior written consent of the record subject. (See sec. IV)

c. **Processing Requests for PA Record Information From a Member of Congress Acting on Behalf of a Third Party.** When an inquiry from a Member of Congress is made on behalf of a person other than the individual whose PA record is to be disclosed (i.e., spouse, family member, friend, etc.), the Member should be advised that the written consent of the individual is required in order to permit disclosure of the information that is requested and, therefore, cannot be provided.

9.24 NOTIFICATION TO INDIVIDUAL OF DISCLOSURES UNDER COMPULSORY LEGAL PROCESS

a. When information is disclosed from an individual's record in response to a court order, and the issuance of that court order is made public by the court which issued it, reasonable efforts must be made to notify the individual of the disclosure.

b. At the time an order for the disclosure of a record is served at a health care facility, efforts will be made to determine whether the issuance of the order has already been made a matter of public record. If the order has not been made a matter of public record, a request will be made to the court that the facility be notified when it becomes public.

c. Notification of the disclosure will be accomplished by notifying the individual to whom the record pertains, by mail, at the last known address. The letter will be filed in the record if returned as undeliverable by the U.S. Postal Service.

9.25 ACCOUNTING OF DISCLOSURES FROM RECORDS

a. An individual may request to be notified of all disclosures of information, both written and oral, from records pertaining to the individual, subject to the provisions of 38 CFR 1.576(c). Facilities are required to keep an accurate accounting for each disclosure of a record to any person or to another agency. An accounting is not required when disclosure is to VA employees who have a need for the information in the performance of their official duties or when disclosure is made under the FOIA. The accounting will include the date, nature and purpose of each disclosure and the name and address of the person or Agency to whom the disclosure is made.

b. The accounting will be retained for 5 years after the date of disclosure or for the life of the record (see RCS 10-1), whichever is longer.

c. The accounting record may be maintained on VA Form 70-5572, Accounting of Records/Information Disclosure under Privacy Act, or by creation of extra copies of the written transaction. The accounting record will be maintained in the record from which the disclosure was made. The procedures established for maintaining an accounting of disclosures will also provide for the maintenance of appropriate records to collect disclosure data to be used in the preparation of the Biennial Privacy Act Report (see par. 9.31.)

d. The accounting records of disclosures will be made available upon request to the individual to whom the record pertains, except for disclosures made for law enforcement purposes as authorized by 38 CFR 1.576(b)(7). (See par. 9.22 a(7).) The individual will be provided information consisting of the date, nature, and purpose of each disclosure, and the name and address of the person or agency to whom the disclosure is made.

9.26 COMPUTER MATCHING PROGRAM

a. The Privacy Act (as amended by Pub. L. 100-503, the Computer Matching and Privacy Protection Act of 1988, hereinafter referred to as the Computer Matching Act) includes requirements for conducting computer matching programs. To be covered the records must exist in automated form and the matching of the records must be computerized. The OMB has published guidelines (54 FR 25818 dated June 19, 1989) which must be followed when conducting computer matching programs.

b. The following terms apply to computer matching programs:

(1) **Computer Matching Program.** A computer matching program is the computerized comparison of two or more automated Federal systems of records or a Federal agency's automated system of records and automated records maintained by a non-Federal (State or local government) agency for the purposes described in paragraph d. The records must themselves exist in automated form. Manual comparisons of printouts of two automated data bases are not included in this definition. A matching program includes all of the steps associated with the match, including obtaining the records to be matched, actual use of a computer, administrative and investigative follow-up of the individuals matched, and disposition of the personal records maintained in connection with the match.

(2) **Recipient Agency.** Recipient agencies are Federal agencies (or their contractors) that receive records from Privacy Act systems of records of other Federal agencies or from State and local governments to be used in matching programs.

(3) **Source Agency.** A source agency is a Federal agency that discloses records from a system of records to another Federal agency or to a State or local governmental agency to be used in a matching program. It is also a State or local governmental agency that discloses records to a Federal agency to be used in a matching program.

(4) **Non-Federal Agency.** A non-Federal agency is a State or local governmental agency that receives records contained in a system of records from a Federal agency to be used in a matching program.

(5) **Federal Benefit Program.** Any program funded or administered by the Federal Government or by any agent or State on behalf of the Federal Government that provides cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to U.S. citizens or aliens lawfully admitted for permanent residence.

c. The Computer Matching Act covers the computerized comparison of records from:

(1) Two or more automated systems of records (systems of records maintained by Federal agencies that are subject to the PA); or

(2) A Federal agency's automated system of records and automated records maintained by a non-Federal (State or local government) agency or agent thereof.

d. The Computer Matching Act covers matching programs that involve Federal benefit programs and matches using records from Federal personnel or payroll systems of records.

(1) **Federal Benefit Program**

(a) Only Federal benefit programs providing cash or in-kind assistance to individuals are covered. A Federal benefits matching program covers only the following categories of record subjects:

1. Applicants for Federal benefit programs (individuals initially applying for benefits);

2. Program beneficiaries (individual program participants who are currently receiving or formerly received benefits); and

3. Providers of services to support such programs (those who are not the primary beneficiaries of Federal benefit programs, but may derive income from them - health care providers, for example).

(b) The match must have as its real purpose one or more of the following:

1. Establishing or verifying initial or continuing eligibility for Federal benefit programs;

2. Verifying compliance with the statutory or regulatory requirements of such programs; or

3. Recouping payments or delinquent debts under such Federal benefit programs.

(c) All four elements (i.e., computerized comparison of data, categories of subjects covered, Federal benefit program, and matching purpose) must be present before a Federal benefit matching program is covered under the provisions of the Computer Matching Act.

(2) **Federal Personnel or Payroll Records Matches.** The Computer Matching Act also includes matches comparing records from automated Federal personnel or payroll systems of records, or such records with automated records of State and local governments. The comparison must be done by using a computer, manual comparisons are not covered. The Computer Matching Act does not cover routine administrative matches provided the purpose of the match is not to take any adverse action against Federal personnel.

e. The following are not included under the definition of matching programs and such programs are not required to comply with the provisions of the Computer Matching Act. However, such matches must be reviewed and approved by the VA Data Integrity Board.

(1) Statistical matches whose purpose is solely to produce aggregate data stripped of personal identifiers.

(2) Statistical matches whose purpose is in support of any research or statistical project, the specific data of which may not be used to make decisions that affect the rights, benefits or privileges of specific individuals.

(3) Pilot matches, i.e., small scale matches, are matches whose purpose is to gather benefit/cost data on which to premise a decision about engaging in a full-fledged matching program. A pilot match may not be conducted unless it is approved by the VA Data Integrity Board.

(4) Law enforcement investigative matches by an agency or component whose principle statutory function involves the enforcement of criminal laws, the purpose of which is to gather evidence against a named person or persons in an existing investigation. The match must flow from a civil or criminal law enforcement investigation already underway.

(5) Certain tax administration and debt collection via tax refund intercept matches.

(6) Routine administrative matches using predominantly Federal personnel records, provided the purpose of the match is not to take any adverse action against Federal personnel, as defined in the Privacy Act, 5 U.S.C. 552a(a)(13).

(7) Internal matches using only records from the Department's systems of records. However, an internal match whose purpose is to take any adverse financial, personnel, disciplinary or other action against Federal personnel is covered by the requirements of the Computer Matching Act.

(8) Background investigations and foreign counter-intelligence matches.

f. Health care facilities will not participate in computer matching programs with other Federal agencies or non-Federal agencies as a "recipient agency" or a "source agency" unless the program is approved by the Regional Director, appropriate VA Central Office staff, the Chief Medical Director and the VA Data Integrity Board and conducted in compliance with the Privacy Act (as amended by the Computer Matching Act), the OMB guidelines (54 FR 25818, June 19, 1989) and applicable Department guidance. Proposals by health care facilities to participate in matching programs will be submitted to the Regional Director (13_/161B) for review and approval. If approved, the proposal will be submitted for further review by appropriate VA Central Office staff and the approval/disapproval of the VA Data Integrity Board.

9.27 APPLICATION OF THE PA TO VA CONTRACTORS

All contracts that provide for the maintenance of a system of records on behalf of the VA to accomplish a Department function, or provide for the disclosure of information from a VA PA system of records to the contractor, must include wording that makes the provisions of the PA apply to the contractor. Such notifications and clauses will conform to those prescribed by Federal Acquisition Regulations, Federal Information Resources Management Regulations, and VA Acquisition Regulations and health care facilities will comply with these requirements. When a contract provides for access to, or maintenance of, information protected by other confidentiality statutes, (e.g., 38 U.S.C. 3305 and 4132) the contract will provide notification to the contractor that the records are protected by these confidentiality provisions which restricts the disclosure of the information and the purposes for which the information may be used.

9.28 ESTABLISHING NEW SYSTEMS OF RECORDS

a. The Privacy Act requires agencies to publish notices in the Federal Register describing new or altered systems of records, and to submit reports on these systems to the OMB (Office of Management and Budget) and to the Congress (see 38 CFR 1.578).

b. Information concerning an individual will not be collected or maintained in such a manner that information is retrieved by an individual identifier unless a system of records

notice is published in the Federal Register. This requirement applies to information about an individual that is maintained in any record or storage medium including paper records or documents, personal computers, minicomputers, word processors, computers, etc.

c. Appendix B to MP-1, part II, chapter 21, contains a copy of VA systems of records notices published in the Federal Register. Prior to collecting or maintaining information concerning an individual in a system of records that is not published in the Federal Register, the health care facility Director will submit a report to the Regional Director (13_/161B) which includes the justification and legal authority for the proposed maintenance of the system of records. Such records will not be established and information collected until the system of records is approved by the Secretary, published for public comment in the Federal Register, and appropriate reports are submitted to the OMB and to the Congress.

9.29 FEES

a. **Photocopying Charges.** A fee will not be charged for any search or review of a record. Upon request the individual to whom a record pertains will be provided with one free copy of their record. When charges are made for additional copies of records, the fee as stated in 38 CFR 1.577(f) will be charged.

b. **Certification of Papers and Documents.** A health care facility employee, normally the Chief, Medical Information Section of Medical Administration Service, will be delegated authority on VA Form 4505, Identification Card, Delegation of Authority, by the health care facility Director to certify information released from records. When requested, the following certification will be furnished:

"Certification - 38 CFR 2.2, I certify that this is a true copy of the original document in VA files.

_____
Name of Employee (Typed), Date Signed
Authority: VA Form 4505"

9.30 PENALTIES

a. A VA employee who knowingly and willfully violates the provisions of 5 U.S.C. 552a(i) shall be guilty of a misdemeanor and fined not more than $5,000, when the employee:

(1) Knows that disclosure of records which contains individually identifiable information is prohibited and willfully discloses the information in any manner to any person or agency not entitled to receive it;

(2) Willfully maintains records concerning identifiable individuals that have not met the PA notice requirements (see par. 9.28); or

(3) Knowingly and willfully requests or obtains any record concerning an individual from VA under false pretenses. (This provision also applies to persons who are not employees.)

b. In addition to the criminal penalties for the violations described above, administrative actions or disciplinary or other adverse actions (e.g., admonishment,

reprimand, termination) may be taken against employees who violate the statutory provisions.

c. In the event a health care facility employee is found criminally liable of a PA violation, a written report of the incident will be provided to the Regional Director (13_/161B).

9.31 BIENNIAL PRIVACY ACT REPORT

a. The PA requires VA to submit to the OMB information for inclusion in the President's Biennial Privacy Act Report to Congress. OMB has not standardized the report format and biennially prescribes the procedures for submission and preparation of the report. Biennially, health care facilities are provided with the procedures for the report.

b. Health care facilities will maintain appropriate records to insure that adequate data are collected for the preparation of the biennial report. At a minimum, health care facilities should collect and be prepared to annually report the following data:

(1) The number of requests from individuals for access to records about themselves in systems of records that cited the PA in support of their requests.

(2) The number of requests for access that cited the PA that were:

(a) granted in whole or part,

(b) denied in whole, and

(c) for which no record was found.

(3) The number of amendment requests from individuals to amend records about them in systems of records that cited the PA in support of their requests.

(4) The number of amendment requests that cited the PA that were:

(a) granted in whole or part,

(b) denied in whole, and

(c) for which no record was found.

9.32-9.34 (Reserved.)

SECTION III. RELEASE OF MEDICAL INFORMATION

UNLESS OTHERWISE INDICATED, THE PROVISIONS OF THIS SECTION DO NOT APPLY TO THE RELEASE OF DRUG ABUSE, ALCOHOLISM OR ALCOHOL ABUSE, HIV (INFECTION WITH THE HUMAN IMMUNODEFICIENCY VIRUS), OR SICKLE CELL ANEMIA INFORMATION (SEE SEC. IV).

9.35 GENERAL

The four statutes which govern the collection, maintenance and release of information from VA patient medical records are:

a. The FOIA (Freedom of Information Act), 5 U.S.C. 552 and implemented by 38 CFR 1.550-1.559 (see Section I of this chapter). The FOIA compels disclosure of reasonably

described VA records to any person unless one or more of nine exemptions apply to the records (see 38 CFR 1.554(a)(1)-(9) and par. 9.07).

b. The PA (Privacy Act), 5 U.S.C. 552a and implemented by 38 CFR 1.575-1.584 (see Section II of this chapter). Generally, the PA provides for the confidentiality of information that is maintained in a PA system of records and permits disclosure of PA-protected records only when specifically authorized by the statute.

c. The VA Claims Confidentiality Statute, 38 U.S.C. 3301 and implemented by 38 CFR 1.500-1.527. This statute provides for the confidentiality of all VA patient and claimant names and addresses and permits disclosure of the information only when specifically authorized by the statute. Title 38, Code of Federal Regulations, Sections 1.500-1.527 are not to be used in releasing information from patient medical records when in conflict with 38 CFR 1.575-1.584 or 42 CFR 2.1-2.67 (52 FR 21796, June 9, 1987).

d. Confidentiality of Drug Abuse, Alcoholism and Alcohol Abuse, Infection With the HIV (Human Immunodeficiency Virus), and Sickle Cell Anemia Medical Records, 38 U.S.C. 4132 and implemented by 42 CFR 2.1-2.67 (52 FR 21796, June 9, 1987). This statute provides for the confidentiality of certain patient medical record information related to drug and alcohol abuse, infection with the HIV, and sickle cell anemia and permits disclosure of the protected information only when specifically authorized by the statute.

9.36 DEFINITIONS

a. **Accredited Representative.** Representatives of organizations recognized by the Secretary in the presentation of claims under the laws administered by VA, meeting the requirements of 38 CFR 14.629 and accredited by the General Counsel of VA, and who holds a veteran's power of attorney.

b. **CHR (Consolidated Health Record).** The patient medical record is a consolidated record of all health care activity information about that patient (inpatient, outpatient, nursing home, and domiciliary, including all clinics and sub-specialty clinics). See subparagraph h.

c. **Court Leave.** For the purpose of this chapter, court leave is the authorized absence from official duty of an employee, without charge to leave or loss of salary, to present records in court or to appear as a witness in the employee's official capacity.

d. **Drug and Alcohol Abuse, Infection With the HIV, and Sickle Cell Anemia Medical Records**

(1) These are records which:

(a) identify the existence of drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia;

(b) identify the patient; and

(c) were created in the seeking of or for purposes of providing treatment (including education, training, rehabilitation or research) for one or more of these conditions.

(2) All three factors must be present for a patient medical record to be protected from disclosure by 38 U.S.C. 4132. However, a disclosure of patient information that includes

two of the three factors, when it is reasonably clear that the missing factor is known or can be readily known, should be handled as though the information included all three factors necessary for protection.

e. **Duly Authorized Representative.** An individual authorized in writing by a competent beneficiary or legally appointed guardian to act for the patient.

f. **Medical Information.** Information pertaining to examination, medical history, diagnosis, findings or treatment, including such information as laboratory examinations, X-rays, microscopic slides, photographs, prescriptions, etc.

g. **Patient.** Any person receiving care in a VA medical center, nursing home care unit, community nursing home, domiciliary, or outpatient clinic; any person receiving medical care authorized by VA.

h. **Patient Medical Record.** An official record documenting examination, diagnosis, treatment, and/or care of a patient including the medical as well as administrative folder of the consolidated health record and records obtained from non-VA sources that are filed in the CHR; any subsidiary records, i.e., Agent Orange registry, tumor registry, laboratory records, radiology records, perpetual medical record, etc.

i. **Routine Use.** (See par. 9.16g.) The routine uses for the Patient Medical Records PA system of records (24VA136) are published in MP-1, part II, chapter 21, appendix B. A routine use is a discretionary authority to permit disclosure from a record without the patient's signed consent, however, it does not compel disclosure. A routine use permits release of drug or alcohol abuse, HIV, or sickle cell anemia medical information only when the disclosure is also authorized by 38 U.S.C. 4132.

j. **Subpoena.** A document issued by or under the auspices of a court to cause an individual to appear and give testimony before a court of law.

k. **Subpoena Duces Tecum.** A subpoena requiring an individual to produce documents, records, papers or other evidence to be brought to a judicial court for inspection. A subpoena is not sufficient authority to authorize the disclosure of PA records unless the subpoena is signed by the judge of a court.

9.37 MANAGEMENT OF RELEASE OF MEDICAL INFORMATION

a. The health care facility Director will publish a facility policy governing the access to, use, and release of patient medical information and assure distribution to all concerned employees.

b. The Chief, Medical Administration Service is designated the health care facility System Manager for the Privacy Act Patient Medical Records (24VA136) system of records. The System Manager is responsible for the release of information from the patient medical record.

(1) Release of information from the medical record is a complex function, requiring trained and qualified employees and expert guidance. The Chief, Medical Administration Service will normally assign this function to the Medical Information Section. When feasible, the release of information activity will be located in proximity to inactive records and reproduction equipment.

(2) The Chief, Medical Administration Service will provide for the prompt identification and indexing of incoming requests for medical record information. To

ensure timely and informed release of information, all requests will be processed through a central point.

(3) The Chief, Medical Administration Service will conduct a comprehensive systematic review of the release of information activity not less frequently than once every 12 months.

(4) Such factors as workload, processing time, etc., should be reviewed periodically to identify backlogs and expedite responses to requests for information.

c. The Chief of Staff of a health care facility will establish guidelines for personnel in reviewing medical records to determine if such records contain sensitive information. Sensitive medical record information will be released in accordance with the provisions of paragraph 9.19.

d. The District Counsel at the appropriate regional office will resolve legal questions concerning the release of information as provided in 38 CFR 1.500(c).

9.38 POLICY

a. Appropriate controls will be established to safeguard the patient's medical record from loss, defacement and tampering and to insure the confidentiality of information. Access to medical record information will be limited to those VA employees with a need for the information in the performance of their official duties. Employees that have access to patient medical information will be instructed on an ongoing basis on the safeguarding and releasing of information from medical records. At a minimum, instructions will be provided at the time of employment and on an annual basis thereafter. Normally, all patient medical record information will be released by Medical Administration Service.

b. Release of information will be from the official patient medical record. Generally, no release will be made of highly confidential information or social data pertaining to the patient's family or a third party. Information from the medical record will be released only with the signed consent of the patient or the legal guardian of an incompetent patient, except as stated in this chapter.

c. The provisions of section II of this chapter apply to the release of information from medical records unless otherwise specified in this section.

d. Accredited representatives who hold a signed power of attorney will be given access to the patient's medical record except when the records contain information related to drug or alcohol abuse, tests for or infection with the HIV, or sickle cell anemia (which requires the patient's specific written consent, which can be included in a power of attorney). The record will be examined for medically harmful (sensitive) information prior to review by the authorized service organization representative. The representative will be cautioned about sensitive information to ensure it is not conveyed to the patient. In any case where there is a question regarding the existence of a valid Power of Attorney, or an individual's status as an authorized service organization representative, health care facility personnel will verify both of these matters with the Regional Office that maintains the individual's claims folder before a disclosure is made.

e. An accounting of disclosures of information from patient medical records will be maintained as required by paragraph 9.25 and 38 CFR 1.576(c).

9.39 TIME STANDARDS FOR RELEASE OF INFORMATION

a. Requests for release of information from a patient's medical record will be answered within 10 workdays from the date of receipt. When it becomes apparent that the requested material cannot be provided within this timeframe, an acknowledgment of written requests will be sent within 10 workdays of receipt. The requester will be advised that the information will be sent as soon as it becomes available. VA Form Letters 30, 47 and 70-17, as appropriate, are available for this purpose.

b. When, for good cause shown, the information cannot be provided within 30 workdays from the date the request was initially received, the requester will be informed in writing as to the reason the information cannot be provided and the anticipated date the information will be available.

9.40 REQUEST FOR AND CONSENT TO RELEASE INFORMATION

a. When consent of the patient is required to release medical information, the request will be in writing and include the following information:

(1) Name and address of organization, agency or individual to whom information is to be released;

(2) Type and extent of information requested;

(3) Periods of treatment involved;

(4) Purpose for which information is to be used (not required when patients request a copy of their own record);

(5) Signature of patient or other person authorized to consent to release; and,

(6) Date signed.

b. Consent may be given on VA Form 70-3288, Request For and Consent To Release of Information From Claimant's Records, in correspondence requesting release signed by the patient or person authorized to act for the patient, or on stationery or forms of the individuals, agencies or organizations to whom the information is to be released, signed by the patient. The written consent or request for release of the information must be clear as to the fact that VA is specifically named by the individual as being authorized to disclose information. Information will not be disclosed based on a blanket consent. Photocopies of authorizations and requests to release medical information are acceptable.

c. Information concerning treatment which is subsequent to the date of the consent will not be disclosed. However, when specifically consented to by the patient in writing for such purposes as medical care cost recovery or medical indemnity insurance, information from a continuous period of care may be released periodically to a designated recipient on the basis of the patient's initial consent. The consent must be specific as to the type of information to be disclosed, the purpose of the disclosure, and the date, event, or condition upon which the consent will expire if not revoked before. The date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

d. Written authorization for release of information is valid when obtained from:

(1) The patient.

(2) A court appointed legal guardian.

(3) An individual authorized in writing by the patient (or the patient's legal guardian) to act in the patient's behalf.

e. The PA provides for substituted consent for disclosure of information by the legal guardian of any individual who has been declared by a court of competent jurisdiction to be incompetent due to physical or mental incapacity or age. The PA does not provide for substituted consent in the case of a nonjudicially declared incompetent patient. In the case of a patient who does not have a court appointed guardian, but is unable to give informed consent to release information due to a physical or mental condition, disclosure may be made only pursuant to an appropriate routine use for the Patient Medical Records PA system of records (24VA136), e.g., Routine Use No. 20, or other PA exception (see 38 CFR 1.576(b) and par. 9.22). A VA Federal fiduciary administratively appointed by the Veterans Benefits Administration to administer a beneficiary's VA monetary benefits is not empowered to exercise PA rights of the VA beneficiary who is the subject of that appointment.

f. Unless otherwise specifically limited, a consent for release of information is valid for 6 months from the date signed.

9.41 TRANSMITTAL OF MEDICAL INFORMATION

Medical information will be transmitted with the stipulation that it is privileged and confidential information which should be handled with appropriate sensitivity and generally should not be redisclosed without the consent of the patient.

9.42 REQUESTS FOR INFORMATION FROM RETIRED RECORDS

Requests for information from records which have been retired for storage to a Federal record center will be processed by the facility which retired the record, as follows:

a. When appropriate, the information will be furnished from pertinent documents in the PMR (perpetual medical records) envelope which is maintained at the medical center.

b. When the requested information is not in the PMR envelope or the available information is not sufficient to respond to a request, the retired record will be recalled from the Federal records center and the information furnished. Recall requests to the records center must contain sufficient information to identify the requested records as well as the purpose for retrieval. Patients and individuals acting on behalf of patients will not be advised to request information directly from the Federal Records Center.

9.43 REQUESTS FOR INFORMATION REQUIRING REFERRAL TO DISTRICT COUNSEL

The following types of requests for information will be reviewed with the District Counsel and any release of information will be made only in compliance with their instructions:

a. Requests for medical information that is to be used in suits against the U.S. Government or in a prosecution against a patient that has been instituted or which is being contemplated.

b. Subpoenas for medical records issued by or under the auspices of a court or quasijudicial body not accompanied by a consent from the patient.

c. Requests for information which indicate possible liability for the cost of hospitalization and medical services (such as tort feasor, worker's compensation, or other third party cases), as categorized in M-1, Part I, chapter 15.

9.44 RELEASE INCIDENT TO RECOVERY OF COSTS OF MEDICAL CARE

a. **With Assignment of Claim.** The patient's signature and assignment of claim on VA Form 10-2381, Power of Attorney and Agreement, constitutes proper authority to release information from the medical record to the extent required to effect recovery of the costs for medical care provided to patients in cases of tort feasor, worker's compensation, automobile accident reparation insurance, and crimes of personal violence. The consent on VA Form 10-2381 is sufficient to disclose information related to treatment for drug or alcohol abuse, HIV, and sickle cell anemia.

b. **Without Assignment of Claim**

(1) In order to recover or collect the cost of medical care from third-party health plan contracts carried by patients, medical record information that is required by the health plan contract may be disclosed to the insurance carrier on the basis of Routine Use No. 14 of the Patient Medical Records PA system of records (24VA136). If the record contains drug or alcohol abuse, HIV, or sickle cell anemia medical information, the patient's written consent will be obtained on VA Form 10-5345 to permit disclosure of the information to the insurance carrier. Medical care cost recovery action will not be initiated if the patient's written consent is not obtained to permit the disclosure of drug or alcohol abuse, HIV, or sickle cell anemia information. However, in cases where a substantial bill is involved (i.e., $25,000 or more) consideration may be given to seeking a court order (38 U.S.C. 4132(b)(2)(D)) to permit disclosure. Such cases will be discussed with the District Counsel.

(2) For the purpose of collecting the cost of medical care, patient medical record information may be disclosed to the Federal agency or non-VA health care institution or provider that referred the patient when the medical care is rendered by VA under the provisions of a contract, sharing agreement, or individual authorization. Such disclosures may be made without the written consent of the patient under the provisions of Routine Use No. 34 of the Patient Medical Records PA system of records. The patient's written consent will be obtained on VA Form 10-5345 to disclose information related to treatment for drug or alcohol abuse, human immunodeficiency virus, or sickle sell anemia.

9.45 DISCLOSURES FROM RECORDS OF DECEASED PATIENTS

a. While under the Privacy Act, written authorization for release of information from a deceased patient's medical record is not required legally, as a matter of policy, such an authorization should be obtained from the administrator or executor of the patient's estate or from the following (with preference given in the order listed):

(1) Surviving spouse (including spouse of common law marriage where recognized by the State) or adult children.

(2) Parents, grandparents, or adult sibling.

(3) Aunts or uncles.

(4) Nieces or nephews.

(5) Others - cousins, etc. (in-laws not included unless there is no living blood relative).

b. The written authorization will include the elements of a written consent described in paragraph 9.40a.

c. The confidentiality provisions of the Privacy Act do not apply to the records of deceased individuals. The disclosure of particularly sensitive personal information about a deceased person may, however, threaten the privacy interests of surviving family members or close associates and should be protected from disclosure. Information concerning the deceased individual cannot be withheld from disclosure on the basis that disclosure would constitute an unwarranted invasion of the decedent's personal privacy under the FOIA "invasion of personal privacy" exemption provided in 38 CFR 1.554(a)(6). However, the privacy of others named or identified in the medical records may be protected under this exemption when it has been determined that the information to be released reflects unfavorably or embarrassingly upon the others named so as to constitute a clearly unwarranted invasion of their personal privacy. The record of a deceased individual is subject to the VA claims confidentiality statute, 38 U.S.C 3301, and the confidentiality provisions of 38 U.S.C. 4132 concerning medical records related to drug abuse, alcoholism or alcohol abuse, infection with the HIV, and sickle cell anemia.

d. Title 38, United States Code, Section 3301 protects from disclosure the deceased individual's name and address. Information that would be injurious to the physical or mental health of the surviving spouse, child, or next of kin, and information that would cause repugnance or resentment toward the decedent also may be protected; however, if a request for such information has been made under the Freedom of Information Act it is questionable whether concern for the reputation or memory of the decedent (as opposed to the personal privacy of a survivor or other living person) would support withholding (see subparagraph c).

e. Title 38, United States Code, Section 4132 protects from disclosure, information which identifies a living or deceased individual and the existence and treatment of drug abuse, alcoholism, infection with the HIV, or sickle cell anemia. Records of a deceased individual that include this type of information can be released only for the purpose of survivorship benefits for the deceased individual's survivor(s). (See par. 9.84.)

f. Information concerning a deceased patient (excluding information related to drug or alcohol abuse, tests for or infection with the HIV, or sickle cell anemia to the extent that it is not included on the death certificate) may be disclosed to a funeral director for the purpose of proceeding with burial arrangements.

g. When the local coroner or medical examiner is informed of, or requests information in connection with, the death of a patient or former patient, all necessary information that is required in order to conduct an inquiry into the cause of death will be released without the consent of the next of kin.

9.46 RELEASE OF AUTOPSY FINDINGS

a. Information from autopsy protocols may be released to a private physician when specifically requested in writing by the next of kin. Normally, a copy of the autopsy clinical finding summary and the listing of clinical-pathological diagnoses on SF 503, Medical Record-Autopsy Protocol, will be disclosed. A copy of the autopsy protocol will not be released for this purpose routinely.

b. When the next of kin requests a report of the autopsy findings, a letter containing pathological diagnosis in lay terminology will be prepared by the primary physician, or in case of absence, by a designee of the Chief of the Bed Service where the patient expired. The Chief, Laboratory Service will assure the expeditious completion of the autopsy protocol and promptly provide the concerned Chief of the Bed Service with the gross autopsy findings. The Chief, Medical Administration Service or designee will assure that a copy of the letter to the next of kin is filed in the patient medical record.

c. If the next of kin subsequently requests a copy of the autopsy protocol, the autopsy protocol may be released if the Chief of Bed Service or designee determines it does not contain information which could be injurious to the physical or mental health of the person in whose behalf the information is sought or cause repugnance or resentment toward the decedent. If the reviewing physician determines the autopsy protocol does contain such information, the autopsy protocol will not be disclosed directly to the next of kin. On the advice of the reviewing physician, the Chief, Medical Administration Service or designee will take one of the following actions:

(1) Arrange for the next of kin to discuss the autopsy protocol with the primary physician or designee at a time and date mutually agreeable, or,

(2) Send a copy of the autopsy protocol to a physician selected by the next of kin. The physician will be advised of the reason for the referral.

d. If there is any indication that the requested information will be used in a lawsuit, the District Counsel will be informed promptly of the circumstances. No further actions will be taken without guidance from the District Counsel.

e. In all cases where the autopsy protocol reveals drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia information which is subject to additional disclosure restrictions, the autopsy protocol will not be disclosed to the next of kin unless the facility Director determines that such disclosure is necessary for the survivor to receive benefits. These records may be released for other than survivorship benefit purposes if those portions relating to drug or alcohol abuse, infection with the HIV, or sickle cell anemia information can be appropriately deleted. Under the survivorship benefit provision, sickle cell anemia information may be released to a blood relative of the deceased veteran for medical follow-up or family planning purposes.

9.47 RELEASE TO NON-VA PHYSICIANS, HOSPITALS AND CLINICS

a. When a patient is referred to a VA facility by a private physician and intends to return to the same physician for followup care, the patient will be encouraged to sign VA Form 70-3288 (or VA Form 10-5345) prior to release from care requesting that medical information be forwarded to the physician.

b. When the individual received inpatient care and information is needed before the hospital summary will be available, SF 544, Statement of Patient's Treatment, may be prepared from the information in the medical record and forwarded. Information provided on the SF 544 will include discharge medications, followup recommendations, and a notification that a copy of the complete hospital summary will follow. Copies of pertinent medical record documents may be sent in lieu of an SF 544. VA Form 70-3288 or 10-5345 will be retained in a suspense file pending the receipt and dispatch of the final summary.

c. Other requests for release of pertinent medical information for treatment purposes to non-VA physicians and other providers of health care, will be processed promptly. When the individual has received inpatient care and the summary is not available, the procedure described in subparagraph b may be followed.

d. Health care facilities will develop local procedures for the prompt release of information to non-VA physicians and facilities for the purpose of treatment in emergent situations. These procedures will include the designation of professional personnel and/or administrative personnel who will assist the outside caller. While consent of the patient is not required to release information under emergent conditions, the medical record will be annotated to indicate the information released, the person to whom the information was released, and the date. A notification of the disclosure will be mailed to the patient at the last known address.

9.48 RELEASE OF INFORMATION FROM NON-VA MEDICAL RECORDS

a. Private hospital or physician records that have been incorporated into the patient medical records are subject to the disclosure provisions of the Privacy Act. An individual requesting this type of record should be encouraged to obtain the information from the hospital or physician that has control over the record. In the event that this course of action is unacceptable to the requester, prior to the disclosure of the records, notice of the impending disclosure should be given to the private hospital or physician stating the legal requirement for VA to disclose the records and indicating that the disclosure will be made in 10 calendar days. While it need not be so stated in the notification, this notice would permit the hospital or physician to take legal action to enjoin such disclosure. If, after 10 calendar days have elapsed and no injunction has been served upon the Department the disclosure should be made.

b. Requests for information in the medical record that was originated by another Federal agency will be referred to the agency that created the documents and the individual advised of the referral or the individual will be advised that additional time will be required for VA to consult with such other agency before a determination can be provided. Information from medical records of beneficiaries of other Federal agencies and allied governments treated or examined in VA facilities will be released under the guidelines provided in this chapter.

c. Disclosure of information in Armed Forces medical records in VA custody will be made under the guidelines provided in this chapter and MP-1, part II, chapter 12.

9.49 RELEASE OF INFORMATION FROM CLAIMS FOLDER

a. Requests for release of medical information in veterans' claims folders are normally handled by the FOIA/PA Officers at regional offices. Copies of compensation

and pension examinations that are maintained in the patient medical record may be released by the health care facility.

b. When a request for access to individual records involves medical information in a claims file and the regional official responsible for the records concludes that the record may include medically sensitive information that may be harmful to the individual, the request and related information will be referred to the nearest VA medical facility for processing. The request will be processed in accordance with the provisions of paragraph 9.19.

9.50 SUPPLYING ABSTRACTS OR COPIES OF DOCUMENTS FROM PATIENT RECORDS AND EXPRESSING OPINIONS REGARDING EMPLOYABILITY AND DEGREE OF DISABILITY

a. VA physicians may express an opinion concerning a patient's physical activity limitations as well as when a patient may be physically able to return to employment and include work restrictions. However, except when requested by the Veterans Benefits Administration or the District Counsel, VA physicians and other employees will refrain from expressing opinions or conclusions concerning an individual's basic employability, degree of disability or an individual's ability to operate a motor vehicle. When this type of information is requested by other than VA personnel, (with the signed consent of the patient) sufficient information from the patient's medical record (to the extent that it exists) will be provided in order that appropriate officials of the organization or agency requesting such an opinion may make the determination. In any case where State law requires health care professionals or facilities to report to the Department of Motor Vehicles information related to an individual's treatment for conditions which impair the person's ability to safely operate a motor vehicle, such reporting may be accomplished under the procedures established in paragraph 9.51.

b. Normally, Medical Administration Service personnel are responsible for responding to requests from other governmental agencies, attorneys, employers, etc., for medical record information that is needed in processing benefit, insurance, disability, and other types of claims. Normally, VA physicians will not prepare medical reports or complete non-VA claims, disability or other types of forms or questionnaires for such purposes. When appropriate authority is present which permits disclosure of medical record information, an abstract of the treatment information will be provided on SF 544, Statement of Patient's Treatment. Except for limited situations where the circumstances warrant the completion of non-VA forms, the SF 544 will be substituted for forms supplied by a requester. When the information normally provided on an SF 544 is insufficient and more detailed information is requested, additional information (to the extent authorized by the written consent or other authority) will be furnished, such as photocopies of the Discharge Summary, History and Physical Examination, Progress Notes, etc.

9.51 RELEASE OF INFORMATION TO FEDERAL, STATE, COUNTY OR LOCAL GOVERNMENT AGENCIES OR INSTRUMENTALITIES

a. Under the provisions of 38 U.S.C. 3301(e) and (f)(2), and consistent with the Privacy Act, name and address and other information (other than drug abuse, alcoholism or alcohol abuse, tests for or infection with the HIV, or sickle cell anemia) may be released from patient medical records to officials of any criminal or civil law enforcement governmental agency or instrumentality (including State, county, and local government health departments) charged under applicable law with the protection of public health or safety as indicated below. (See par. 9.85 for disclosure of information related to

infection with the HIV to public health authorities.) Disclosures may be made pursuant to subsection 3301(f)(2) in two types of situations. The first category is disclosures made under the provisions of paragraph 9.22a(7). The second category of disclosures made under the provisions of § 3301(f)(2) consists of those disclosures being made in response to standing requests from law enforcement agencies which are charged with the protection of the public health or safety and the implementation of reporting laws of a State, and which seek reports on the identities of individuals whom VA has treated or evaluated for certain illnesses, injuries or conditions. In either instance, a qualified representative of the agency must make a written request which states what information is requested, the specific law enforcement purpose for which the information is needed, and identify the law which authorizes the law enforcement activity.

b. Disclosures made under 9.22a(7) consists of those disclosures being made in response to requests received from a law enforcement agency seeking specific portions of VA records pertaining to and retrievable by the name or identifier of a specific person. Such a request would be for information needed in the pursuit of a focused (individual specific and/or incident specific) activity such as a civil or criminal law enforcement investigation. In this case, the written request from the law enforcement entity would also have to meet the criteria in paragraph 9.22a(7).

c. Standing requests differ from information requests made as part of a specific investigation being conducted by a law enforcement entity in that standing requests are founded on State reporting requirements imposed, via State statute or regulation, on those individuals and organizations which are subject to the jurisdiction of the State. These reporting requirements are generally designed to enhance or protect the public health or safety. The information sought through a standing reporting request lies outside of the scope of a focused law enforcement investigation in that such information is not disclosed with the intent of providing information for a specific investigation, even though it may subsequently be used as a basis upon which an investigation may begin. Rather, information disclosed in response to a standing request is provided for the purpose of cooperating with a State reporting requirement. Information so reported may be used for the implementation of some specific administration action, e.g., suspension or revocation of a driver's license, etc., or it may be used for statistical purposes, e.g., registering the incidence of certain types of illnesses or medical conditions. One other difference is pertinent. In the law enforcement investigation setting, the decision to seek certain information on an individual notwithstanding personal privacy considerations is made by officials of law enforcement entities. In the standing reporting request setting, the decision to seek information on an individual generally has been made a matter of State law.

d. Notifications pursuant to a standing request may be accomplished for such State statute reporting purposes as making notification to police departments of patients treated for gunshot wounds, reporting incidents of suspected abuse and neglect (children, elderly and mentally ill individuals), reporting of communicable diseases to public health departments, reporting of unusual deaths to coroners and medical examiners, etc. Patient names and addresses that are disclosed may be used only for the purpose stated in the request. Title 38, United States Code, 3301(f)(2) imposes penalties on any organization or member who willfully uses the information for purposes other than those so specified in the request. The penalties include a fine of not more than $5,000 in the case of a first offense and not more than $20,000 in the case of any subsequent offense.

e. A file will be maintained on each agency that submits a standing written request for information under the provisions of this paragraph. The health care facility Director will acknowledge the receipt of an agency's request and advise the agency of the penalties regarding the misuse of the information and that the request must be updated in writing every 4 years.

f. In addition to the disclosure provisions described above, patient medical record information may be disclosed to another Federal agency under the provisions of 38 U.S.C. 3301(b)(3) when the information is needed in order to perform a function of the requesting agency. Disclosures under this provision must be permitted also by one or more of the disclosure provisions of the PA described in paragraph 9.22a.

9.52 BREATH ANALYSIS AND BLOOD ALCOHOL TEST

a. Requests by law enforcement officers and/or government officials for the taking of a blood sample from patients at VA health care facilities, for analysis to determine the alcoholic content, will be denied. In these situations the requester will be advised that VA personnel do not have authority to withdraw blood from a patient, with or without their consent, for the purpose of releasing it to anyone for determination as to its alcoholic content. If a blood alcohol analysis is conducted for treatment purposes, then these results may be released with patient's consent, or in response to a valid written request from a civil or criminal law enforcement activity that is made under the provisions of paragraph 9.22a(7).

b. VA medical personnel have no authority to conduct chemical testing on patients for law enforcement purposes. However, VA personnel should not deny access to VA patients to State and local authorities who, in the performance of their lawful duties, seek to conduct blood alcohol or breath analysis tests (or other similar tests) for investigative/law enforcement purposes, unless the conduct of such tests would create a life-threatening situation for the patient. VA personnel should not assist State or local law enforcement officials in the performance of police functions which are outside the official's authority. In every case where the authority of the law enforcement official is unclear, District Counsel should be contacted for guidance.

9.53 DISCLOSURE OF INFORMATION TO CANCER OR TUMOR REGISTRIES

a. VA medical record information relative to the diagnosis, treatment, and disposition of cancer or tumor cases, may be disclosed without patient consent under the following conditions:

(1) Disclosure of medical record data, excluding name and address (unless the name and address is furnished by the requester), may be made when such information is requested by any institution listed in the current bulletin of the American College of Surgeons as conducting an approved cancer program or cancer registry. The bulletin is updated two or three times each year and a copy may be obtained by writing to the American College of Surgeons, ATTN: Cancer Office, 55 East Erie, Chicago, Illinois 60611.

(2) Disclosure of medical record data, including name and address, may be made to a cancer registry operated by the Department of Health and Human Services, or agency thereof, or other Federal agency. The head of the requesting agency or designee must submit a written request which indicates that the information is needed in order to accomplish a statutory purpose of that agency.

(3) Disclosure of medical record data, including name and address, may be made to other governmental (non-Federal) cancer registries only if the law of the State under which the requesting cancer registry operates requires health care providers who are subject to State law to report name, address and medical record data to the cancer registry, and the registry is operated by a State public health service or State health or safety agency which has law enforcement authority. A qualified representative of the agency must make a written request that the name(s) and/or address(es) and medical record data be provided for a purpose required by law and identify the law involved. When disclosure of information is made under the provisions of this subparagraph, the requester must be aware of the penalty provisions of 38 U.S.C. 330l(f). If the requester does not indicate in the request awareness of this penalty provision, disclosure of medical information under this subparagraph will be accompanied by a precautionary written statement worded similar to the following:

> "This information is being provided to you in response to your request (each VA health care facility should appropriately identify the request). Please be advised that under the provisions of Title 38, United States Code, Section 3301(f), if you willfully use the patient's name and/or address for any purpose other than for the purpose specified in your request, you may be found guilty of a misdemeanor and fined not more than $5,000 in the case of a first offense and not more than $20,000 in the case of any subsequent offense."

(4) Disclosure of medical information may be made to a cancer registry which has provided VA with adequate written assurance that the record will be used solely as a statistical research or reporting record. However, the documentation provided by VA to the requester must be in a form that is not individually identifiable.

b. Prior to disclosure of the requested information, the assistance of the District Counsel will be sought, when appropriate, in evaluating the applicable law relative to the statutory authority of a governmental agency to gather information on cancer patients.

c. Information disclosed subsequent to paragraph a(1) or (2) will be accompanied by a precautionary statement worded as follows: "This information is confidential and privileged and should be treated as is customary in professional and medical practice."

9.54 DISCLOSURE OF MEDICAL RECORD INFORMATION FOR RESEARCH PURPOSES

a. Patient medical record information, including name and address, may be released to a Federal agency in order to conduct research that furthers their statutory mission. A qualified representative of the agency must make a written request and provide sufficient information concerning the study to include the specific record information that is needed, the purpose of the study, an explanation as to how the information will be used, the identification of the statutory authority that requires the research study, and assurances that the confidentiality of the information will be maintained. Information may be disclosed to a Federal agency's research study contractor if satisfactory assurances are provided that the contractor is required to maintain the confidentiality of the information under the terms of the contract.

b. Patient medical record information, excluding name and address unless this information is provided by the requester, may be disclosed to State, county or local government agencies or nongovernment agencies, for the purpose of conducting research. A qualified representative of the agency must make a written request and provide sufficient information concerning the study to include the specific record information that is needed, the purpose of the study, and an explanation as to how the information will be used. When patient names and/or addresses are provided, satisfactory assurance must be provided by the agency that all legal and ethical requirements will be met to protect the rights of the individuals and that the confidentiality of the information will be maintained.

9.55 REVIEW OF MEDICAL RECORDS FOR AUDIT AND EVALUATION PURPOSES

a. To the extent that patient medical record information, including name and address information, is relevant and necessary to the conduct of an audit or evaluation, records may be reviewed by or disclosed to the following:

(1) VA personnel who need the information for such purposes as special purpose or site visits, audits and reviews under the HSRO program, clinical and administrative research and audits, and audits and investigations by staff of the VA Office of Inspector General.

(2) The General Accounting Office if the records or information pertain to any matter within its jurisdiction.

(3) Evaluation agencies under contract with VA which are charged with facility-wide monitoring of all aspects of patient care (such as the Joint Commission on Accreditation of Healthcare Organizations).

(4) Evaluation agencies under contract with VA that are charged with more narrowly focused monitoring (e.g., College of American Pathologists, American Association of Blood Banks, etc.) to the extent that the information is relevant to their review.

(5) Members and staff of Congressional committees and subcommittees if the record pertains to subject matter for which the committee or subcommittee has oversight responsibility.

b. Individuals who conduct an audit or evaluation and receive or review patient medical record information will be advised that the information is disclosed for audit or evaluation purposes only and that given its private, confidential nature, should be handled with appropriate sensitivity. Patient identifying information may not be redisclosed unless such disclosure meets the requirements of 38 CFR 1.576(b) and 38 U.S.C. 3301.

9.56 RELEASE OF PHOTOGRAPHS AND MEDICAL INFORMATION CONCERNING INDIVIDUAL PATIENTS TO NEWS MEDIA

a. Photographs and medical information concerning individual patients may be released to news media with the signed consent of the patient on VA Forms 10-3203, 70-3288, or 10-5345, as appropriate. In the case of a patient with a psychiatric condition, the responsible physician must certify that the patient has sufficient understanding and capacity to comprehend the nature of the information. In those instances where the patient has been declared legally incompetent, photographs or information may be released if written consent of the court-appointed legal guardian has been obtained.

b. Photographs and medical information concerning individual patients in drug or alcohol abuse, infection with the HIV, and sickle cell anemia treatment programs may be released to news media with the prior written consent of the patient, provided the consent was given voluntarily and the disclosure would not be harmful to the patient. The written consent must comply with the provisions of paragraph 9.80. (See MP-1, pt. I, subpar. 4b(2), ch. 4.) There also must be signed consent for the redisclosure by the media entity or reporter.

c. VA public affairs policy is contained in MP-1, part I, chapter 4.

9.57 REQUESTS FOR RELEASE OF PATIENT NAME AND/OR ADDRESS

a. The name and address of a patient or their dependents, wherever found in medical or other records, will not be released without the patient's written consent unless such disclosure is authorized by one or more of the disclosure provisions of the PA (see 38 CFR 1.576(b) and par. 9.22) and 38 U.S.C. 3301. Under the provisions of Section 3301, this information may be disclosed:

(1) To an authorized representative of the patient who has the express written consent of the patient to act on the patient's behalf, and a court appointed legal guardian acting on behalf of the patient.

(2) When required by process of a Federal court.

(3) When required by a Federal agency for official purposes of that agency (including Congress).

(4) When needed in mental competency proceedings.

(5) When needed in a State or municipal court (providing that VA determines disclosure is necessary and proper).

(6) In connection with any VA proceeding for the collection of debts owed the Government.

(7) To any nonprofit organization if the release is directly related to VA programs and benefits.

(8) To any criminal or civil law enforcement governmental agency or instrumentality (Federal, State, county and local government) charged under applicable law with the protection of the public health or safety.

b. Any organization that wants to receive a list of names and addresses of present or former patients and their dependents must make written application under the provisions of 38 CFR 1.519 to the Director, Office of Information Resources Policies (72) at VA Central Office.

c. Requests for lists of educationally disadvantaged veterans will be addressed to the Director of the nearest VA regional office as provided in 38 CFR 1.519.

d. When a request is received from private organizations or individuals for names of patients for the purpose of distributing gifts, the Director may furnish names of patients only with their consent.

e. When disclosure of the patient's address is not permissible under the above guidelines, the requester may be advised that a letter, enclosed in an unsealed envelope

showing the name of the beneficiary but no return address, and bearing sufficient postage, will be forwarded by VA (see 38 CFR 1.518(c)). Letters for the purpose of debt collection, canvassing, or harrassing a patient will not be forwarded.

9.58 DISTRIBUTION OF GAINS AND LOSSES SHEET TO RECOGNIZED SERVICE ORGANIZATIONS

a. The health care facility G&L (Gains and Losses sheet) identifies patients receiving care by name, Social Security number and ward/bed section. Its main purpose is to inform medical center components who have a need for such information of daily changes in the patient population.

b. Accredited representatives of recognized veterans service organizations assigned and furnished space in the medical center or regional office may be furnished a copy of the daily G&L sheet provided a one-time written application to the Chief, Medical Administration Service is made by the individual responsible for assigning the representative. The request must state the purpose for which the information is sought and how the purpose is directly connected with the conduct of programs and utilization of benefits under Title 38, United States Code. The organization must certify that all those with access to the information on the G&L sheet are aware of criminal penalties under 38 U.S.C. 3301 and will not use the information for any purpose other than that stated in the application.

c. G&L sheets provided to recognized service organizations will contain a cautionary statement stamped on the face of the G&L sheet. The language to be used for this statement is:

> "This information is provided only for purposes directly connected with the conduct of programs and the utilization of benefits under Title 38 as authorized by 38 U.S.C. 330l(f). Any unauthorized secondary use of this information will subject the violator to criminal penalties of up to $5,000 for a first offense and $20,000 for a subsequent offense."

d. G&L sheets containing names of patients who are in receipt of treatment for drug abuse, alcoholism, infection with the HIV, or sickle cell anemia may also be furnished recognized service organizations as stated in subparagraph b., provided the patients are not identified as such.

e. The application and certification will be kept on file in the office of the Chief, Medical Administration Service.

9.59 FEDERAL PARENT LOCATOR SERVICE

a. The Department of Health and Human Services operates the Federal Parent Locator Service which was established to obtain and transmit to authorized State agencies, information as to the whereabouts of any absent parent in order to locate such a person for the purpose of enforcing child support obligations.

b. Individual State parent locator agencies should not contact VA health care facilities directly for address information on absent parents. Any requests received by VA health care facilities for assistance in locating an absent parent will be returned to the

requesting agency and provided with the address of the Federal Parent Locator Service:

Director, Parent Locator Service Division
Office of Child Support Enforcement
Department of Health and Human Services
370 L'Enfant Promenade SW, Fourth Floor
Washington, DC 20447

9.60 OBTAINING MEDICAL INFORMATION FROM PRIVATE PHYSICIANS AND NON-VA FACILITIES

a. The Chief, Medical Administration Service or designee is responsible for the prompt dispatch of requests for medical information available from outside sources and needed in the examination and treatment process. On receipt, requested material will be made available to the physician without delay.

b. Consent of a patient on VA FL 10-212 or equivalent is required to obtain medical information for examination or treatment purposes.

9.61 LOAN OF X-RAY FILM

a X-ray film loaned to VA health care facilities by private physicians and non-VA institutions and agencies will be properly identified and safeguarded to prevent loss or destruction. The Chief, Medical Administration Service in conjunction with the Chief, Radiology Service will set up controls to ensure the prompt return of films when they are no longer needed.

b. M-2, part XI outlines policy and procedures for the loan of VA X-ray film for treatment purposes.

9.62 RELEASE OF MEDICAL RECORDS TO COURTS, QUASIJUDICIAL BODIES AND ATTORNEYS

Requests for records which include information related to drug abuse, alcoholism or alcohol abuse, tests for or infection with the HIV, or sickle cell anemia will be processed in accordance with the provisions of section IV, paragraph 9.86.

a. **Acceptance of a Subpoena for Medical Records**

(1) Generally, a subpoena served on a health care facility is a subpoena duces tecum which requires an individual to produce documents, records, paper or other evidence to a judicial court for inspection. Subpoenas may call for medical records, or specific documents, X-ray films, etc. A subpoena is not sufficient authority to disclose medical records unless the subpoena is signed by the judge of a court or accompanied by the written consent of the patient whose records are the subject of the subpoena. This applies to federal, state, municipal and administrative agency subpoenas.

(2) The District Counsel will be notified in all cases where a health care facility receives a court order for the production of records or a subpoena for records. When a subpoena for medical records is received which is not issued or approved by the judge of a court, or accompanied by the written consent of the patient, upon advice from the District Counsel, either personnel from the health care facility or the District Counsel will notify the party responsible for the issuance of the subpoena that VA is not authorized to disclose the medical record in response thereto. They will be advised that

for VA to have disclosure authority with regard to such subpoened Privacy Act record, the requester would need the written consent of the specific individual whose records are protected under the Privacy Act, a court order, or a request that complies with any of the other exceptions to the consent requirement which are set forth in subsection (b) of the Privacy Act (see 38 CFR 1.576(b)).

(3) Usually, health care facility Directors are named in the subpoena. Substitutions for the person ordered to present records in court normally are made in advance of the date when records are to be produced and with the consent of the party causing the service of a subpoena.

b. **Release of Medical Record Information to Courts, Quasijudicial Bodies and Attorneys**

(1) **Litigation Involving VA.** Where a suit has been threatened or instituted against the Government, or a prosecution against a patient has been instituted or is being contemplated, the request of the patient or the patient's attorney or duly authorized representative for medical records will be referred to the appropriate District Counsel for a determination of the action to be taken.

(2) **Litigation Not Involving VA - U.S. Courts.** Information from a patient's medical record will be released for use in proceedings in a Federal court in response to a court order or a subpoena that is issued or approved by a judge of the court. When the request is not in behalf of the United States the cost of producing and reproducing the record will be paid in advance.

(3) **Litigation Not Involving VA - State, County and Municipal Courts, and Administrative Agencies Functioning in a Quasijudicial Capacity.** Information from medical records may be released for proceedings in these courts in response to a court order or a subpoena that is issued or approved by a judge of the court. Additionally, either consent of the patient or an affidavit from the attorney desiring the records is required. The affidavit will state:

(a) The character of the proceedings.

(b) The purpose for which the requested records are to be used in evidence.

(c) When the information in the records is to be used against the patient, evidence will be produced that furnishing of the records is necessary to prevent perpetration of fraud or other injustice. Any requests for documents or records in suits adverse to the patient will be referred to the District Counsel.

(d) If the subpoena includes a copy of the attorney's motion in which the issuance of the subpoena is sought and the motion includes information that is sufficient to serve the purpose of the affidavit, an affidavit is not required.

(e) The individual who obtained the subpoena will be furnished requested copies of the record after payment of the proper fee.

(4) **Release to Attorneys for Use in Suits Not Involving the Government.** Direct requests from attorneys for copies of information in VA medical records for use in such suits will be accompanied by the signed consent of the patient.

c. **Producing Medical Records in Court or in Quasijudicial Proceedings**

(1) Prior to producing the original medical record in court, the record will be reviewed for completeness, making certain all reports have been filed and no signatures are missing. Any medical records of periods of care or treatment which have no bearing on the case under consideration unless listed on a court order will be removed. The expense of production of the record and reproduction of those documents that are intended to be offered in evidence should be ascertained in advance. Further, an agreement will be reached, if possible, with the court concerning the time the VA employee will be needed with the records to avoid loss of time. Any such arrangements which cannot be completed in advance should be discussed promptly by the producing employee with the clerk of the court. Health care facility Directors are authorized to waive charges incident to production of records or testimony of witnesses when:

(a) A copy of a record or document will serve as a substitute for the personal appearance of a Government witness who has been requested by a court;

(b) VA has a reimbursable bill to collect, and the files are produced at the request of the patient's insurance company from which VA seeks reimbursement or at the request of the patient's attorney who is cooperating with VA; or,

(c) When the evidence is sought on behalf of the prosecution in a criminal case and the prosecuting authorities are not lawfully authorized to pay such charges. However, fees and mileage allowance prescribed by State statute will be collected.

(2) VA records will remain in the custody of a VA employee at all times. An employee who merely brings records to a judicial proceeding will promptly report their presence to the clerk of the court. The employee may be requested to take the witness stand but will limit testimony to identification of the record and will not comment on the content of the record.

(3) It is advisable to prepare a photocopy of the record. If the judge or the attorney requests the entire record or part of the record to be held in evidence, permission should be obtained to substitute the copy so that the original may remain in the custody of VA. The custody and disclosure of VA medical records is governed by 38 U.S.C. 3301, which provides that VA records are confidential and privileged, and authorizes the Secretary of Veterans Affairs to make rules governing their production in court. This regulation has been published in the Federal Register and has the force and effect of law. It is found in 38 CFR 1.511(b) and (c). Health care facilities may wish to summarize the contents of the medical record on a data sheet, i.e., Page 1, VA Form 10-1000, Page 2, SF 504, etc. A copy of the data sheet should be retained and the original taken to court with the record. If the court insists on retaining the original records or any portion thereof, the VA employee will obtain an itemized receipt, specifying the purpose for which the judge is retaining the records and the date when VA will regain custody. When a data sheet is used to summarize the contents of the record, it may be used to obtain such receipt. The data sheet will facilitate review of the record for completeness when it is returned.

(4) When an employee is requested to testify to the facts contained in the record and the facts within their knowledge, a determination will be made as provided in 38 CFR 1.522 whether disclosure of any part of the record would be detrimental to the physical or mental health of the patient. When the record contains information which has been determined injurious to the patient, the employee will ask the court that contents of the record not be disclosed and that the employee not be required to testify.

9.63 LEAVE, FEES AND EXPENSES RELATED TO COURT APPEARANCES

The policies concerning court leave, employees appearing as witnesses, temporary duty travel of employees appearing as witnesses, and the charging of fees related to such appearances are contained in MP-1, part II, chapter 2.

9.64 PROCEDURES RELATED TO COURT APPEARANCES

Health care facilities will develop procedures related to employees presenting testimony and/or VA records in court. The assistance of the District Counsel will be requested in developing these procedures to assure compliance with VA regulations and State requirements.

9.65-9.74 (Reserved.)

SECTION IV. RELEASE OF MEDICAL RECORD INFORMATION RELATED TO DRUG ABUSE, ALCOHOLISM OR ALCOHOL ABUSE, TESTS FOR OR INFECTION WITH THE HIV (HUMAN IMMUNODEFICIENCY VIRUS), OR SICKLE CELL ANEMIA

9.75 DEFINITIONS

a. **Alcohol Abuse.** The term "alcohol abuse" means the use of an alcoholic beverage which impairs the physical, mental, emotional, or social well-being of the user.

b. **Contractor.** The term "contractor" means a person who provides services to VA such as data processing, dosage preparation, laboratory analyses or medical or other professional services. Each contractor who is performing services that are related to the treatment of patients for drug or alcohol abuse, HIV, or sickle cell anemia must be required to enter into a written agreement which requires the contractor to: institute appropriate procedures for safeguarding the information; resist in judicial proceedings any efforts by others to obtain access to patient information that is not otherwise releasable under 38 U.S.C 4132; and, subjects the contractor to the provisions of 38 U.S.C. sections 3301 and 4132, 5 U.S.C. 552a (The Privacy Act) and 38 CFR 1.576(g).

c. **Diagnosis.** The term "diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition which is identified as having been caused by that abuse, or any reference to sickle cell anemia or infection with the HIV which is made for the purpose of treatment or referral for treatment, or, in the case of HIV, testing. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is subject to the provisions of this chapter. These provisions do not apply to a diagnosis of drug overdose or alcohol intoxification which clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

d. **Drug Abuse.** The term "drug abuse" means the use of a psychoactive substance for other than medicinal purposes which impairs the physical, mental, emotional, or social well-being of the user.

e. **Infection With the Human Immunodeficiency Virus.** The term "infection with the human immunodeficiency virus" means the presence of laboratory evidence for human immunodeficiency virus infection. For the purposes of this chapter, the term includes the testing of an individual for the presence of the virus or antibodies to the virus and information related to such testing (including tests with negative results).

f. **Patient.** The term "patient" means any individual or subject who has applied for or been given diagnosis or treatment, rehabilitation, education, training, evaluation, or enrolled in a research study for drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia or sickle cell trait. The term includes any individual who, after an arrest on a criminal charge, is interviewed and/or tested preliminary to a determination as to eligibility to participate in a treatment or rehabilitation program. The term "patient" for the purpose of infection with the HIV or sickle cell anemia, includes one tested for the disease.

g. **Records.** The term "records" means any information received, obtained or maintained (whether documented or not) by an employee or contractor of VA, for the purpose of seeking or performing VA program or activity functions regarding an identifiable patient for drug abuse, alcoholism, infection with the HIV, or sickle cell anemia. This includes a primary or other diagnosis or other information which identifies, or could reasonably be expected to identify, a patient as having one of these conditions (e.g., alcohol psychosis, drug dependence), but only if such diagnosis or information is received, obtained or maintained for the purpose of seeking or performing one of the program or activity functions. Program or activity functions include evaluation, treatment, testing, counselling, education, training, rehabilitation, research, or referral for one of these conditions. The provisions of this chapter do not apply if such diagnosis or other information is not received, obtained or maintained for the purpose of seeking or performing a function or activity relating to one of these conditions for the patient in question. Whenever such diagnosis or other information, not originally received or obtained for the purpose of one of the program or activity functions, is later used for such a purpose those original entries become a "record" and the provisions of this section thereafter apply to those entries. These provisions do not apply to records or information the disclosure of which could not reasonably be expected to disclose the fact that a patient has been connected with a VA program or activity function relating to one of these conditions.

(1) The following are examples of instances whereby records or information related to alcoholism or drug abuse are covered by the provisions of this chapter:

(a) A patient with alcoholic delirium tremens is admitted for detoxification. The patient is offered treatment in a VA alcohol rehabilitation program which he declines.

(b) A patient who is diagnosed as a drug abuser applies for and is provided VA drug rehabilitation treatment.

(c) While undergoing treatment for an unrelated medical condition, a patient discusses with the physician his use and abuse of alcohol. The physician offers VA alcohol rehabilitation treatment which is declined by the patient.

(2) The following are examples of instances whereby records or information related to alcoholism or drug abuse are not covered by the provisions of this section:

(a) A patient with alcoholic delirium tremens is admitted for detoxification, treated and released with no counseling or treatment for the underlying condition of alcoholism.

(b) While undergoing treatment for an unrelated medical condition, a patient informs the physician of a history of drug abuse 15 years earlier with no ingestion of drugs since. The history and diagnosis of drug abuse is documented in the hospital summary and no treatment is sought by the patient or offered or provided by VA during the current period of treatment.

(c) While undergoing treatment for injuries sustained in an accident, a patient's medical record is documented to support the judgment of the physician to prescribe certain alternate medications in order to avoid possible drug interactions in view of the patient's enrollment and treatment in a non-VA methadone maintenance program. The patient states that continued treatment and follow-up will be obtained from private physicians and VA treatment for the drug abuse is not sought by the patient nor provided or offered by the staff.

h. **Sickle Cell Anemia or Trait.** The term "sickle cell anemia" includes any activities relating to testing, diagnosis, treatment, or any other procedure relating to the disease.

i. **Treatment.** The term "treatment" means the management and care of a patient for drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia, or a condition which is identified as having been caused by one or more of these conditions, in order to reduce or eliminate the adverse effects upon the patient. The term includes testing for the HIV or sickle cell anemia.

9.76 GENERAL

a. The provisions of this section apply to any information, whether or not recorded, which is maintained in connection with a drug abuse, alcoholism, infection with HIV, or sickle cell anemia program or activity and prohibit disclosure of patient records unless permitted by this section, 38 U.S.C. Sections 3301 and 4132, 42 CFR 2.1-2.67 (52 FR 21796), and the PA. The prohibition on disclosure applies to information which would identify an individual as a drug abuse, alcoholism, HIV, or sickle cell anemia patient. Except where authorized by a 38 U.S.C. 4132 court order, no information covered by this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any VA or non-VA investigation of a patient.

b. The following types of communications do not constitute disclosures of records:

(1) Communication of information between or among VA personnel who have a need for the information in connection with their duties in the provision of health care, adjudication of benefits, or in carrying out administrative responsibilities related to those functions, including personnel of the Office of the Inspector General who are conducting audits or evaluations.

(2) Communications between VA and a contractor of information needed by the contractor to perform their services.

(3) Communications with law enforcement officers which are directly related to a patient committing or threatening to commit a crime on the premises of a health care facility or against personnel of VA. The disclosure of information must be limited to the circumstances of the incident, including the patient status of the individual involved in the incident, the individual's name and address when a written request from the law enforcement agency has been submitted as provided in paragraph 9.51, and the individual's last known whereabouts.

(4) Communications of information to the Department of Justice or U.S. Attorneys who are providing support in litigation or possible litigation involving VA.

(5) Communication of information which includes neither patient identifying information or identifying numbers assigned to patients, or information that would otherwise, under the circumstances, not identify a patient.

c. The provisions of 38 U.S.C. 4132, this chapter and 42 CFR 2.1-2.67 (52 FR 21796) do not apply to records of identity, diagnosis, prognosis, or treatment pertaining to any given individual maintained over any period of time in which the program or activity function terminated prior to (and was never resumed subsequent to):

(1) In the case of drug abuse, March 21, 1972.

(2) In the case of alcoholism or alcohol abuse, May 14, 1974.

(3) In the case of sickle cell anemia, September 1, 1973.

(4) In the case of infection with the HIV, May 20, 1988.

9.77 CONFIDENTIALITY

a. Information contained in records related to drug or alcohol abuse, HIV, or sickle cell anemia will be confidential and may be disclosed or used only as authorized by 38 U.S.C. 4132, 42 CFR 2.1-2.67 (52 FR 21796), and this section. These records may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceeding conducted by any Federal, State, or local authority.

b. Any authorized disclosure from records related to drug or alcohol abuse, HIV, or sickle cell anemia, whether with or without the patient's consent, will be limited to that information which is necessary in light of the need or purpose for the disclosure.

c. The presence of any inpatient in a medical facility (or resident in a residential facility) for the treatment of drug or alcohol abuse, HIV, or sickle cell anemia may be acknowledged to callers and visitors with the patient's written consent. Without a written consent, the presence of any inpatient or resident in a facility for the treatment of a variety of conditions may be acknowledged if done in such a way as not to indicate that the patient is being treated for drug or alcohol abuse, HIV, or sickle cell anemia.

d. Any request for disclosure of patient medical records which is not permissible under 42 CFR 2.1-2.67 (52 FR 21796) and this section, must be responded to in a way that will not reveal that an identified individual has been, or is being treated for drug or alcohol abuse, HIV, or sickle cell anemia.

9.78 SECURITY FOR RECORDS

Appropriate precautions must be taken for the security of records that are covered by this section. Written records containing any patient information will be kept in a secure room or in a locked file cabinet, safe, or similar container, when not in use. Access to information stored in computers will be limited to authorized VA employees who have a

need for the information in performing their duties. These security precautions will be consistent with 38 CFR 1.575-1.584. The facility policy governing the access to, use, and the release of patient medical information discussed in paragraph 9.37a will include procedures concerning records related to treatment for drug or alcohol abuse, HIV, and sickle cell anemia.

9.79 PATIENT IDENTIFICATION CARDS AND PUBLIC SIGNS

a. A health care facility may not request or require a patient to carry an identification card or possess another form of identification while away from the facility premises which would identify the individual as a patient being treated for drug abuse, alcoholism or alcohol abuse, HIV, or sickle cell anemia.

b. A health care facility may maintain cards, tickets, or other devices to assure positive identification of patients, correct recording of attendance or medication, or for other proper purposes, provided that no pressure is brought on any patient to carry any device when away from the facility. Drug or alcohol abuse, HIV, or sickle cell anemia patients may not be required to wear pajamas, robes, wrist bands, etc., that are different from other patients and which would identify them to health care facility staff or others as being treated for one or more of these conditions.

c. Treatment locations should not be identified by signs that would identify individuals entering or exiting these locations as patients enrolled in a drug or alcohol abuse, HIV infection, or sickle cell anemia program or activity.

9.80 DISCLOSURE WITH PATIENT'S CONSENT

a. The written consent of the patient is required for disclosures from records covered by this section except in situations covered by paragraphs 9.85 and 9.86. Accredited representatives of authorized service organizations must have a patient's specific signed consent, such as VA Form 10-5345, in addition to the signed power of attorney, unless the power of attorney contains specific language authorizing VA disclosure of records covered by this section to the representative. With the written consent of the patient which is given freely, voluntarily, and without coercion, information may be disclosed in accordance with that consent to any individual or organization named in the consent. Disclosures to central registries and in connection with criminal justice referrals must meet the requirements of paragraphs 9.82 and 9.83, respectively. The signed consent must be provided on VA Form 10-5345 or in writing and contain the following:

(1) The name of the facility which is permitted to make the disclosure (such a designation does not preclude the release of records from other VA health care facilities unless a restriction is stated on the consent form).

(2) The name or title of the person or the name of the organization to which disclosure is to be made.

(3) The name of the patient.

(4) The purpose of the disclosure.

(5) The extent or nature of information to be disclosed.

(6) A statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance thereon and a specification of the date, event, or condition upon which it will expire without express revocation.

(7) The date on which the consent is signed.

(8) The signature of the patient, or the signature of the person authorized to give consent in lieu of the patient in the case of a minor, incompetent or deceased patient.

b. Any consent will have a duration no longer than that reasonably necessary to satisfy the purpose for which it is given.

c. Information will not be disclosed on the basis of a consent form which--

(1) Has expired;

(2) Substantially fails to conform to any of the consent requirements;

(3) Is known to have been revoked; or

(4) Which is known, or in the exercise of reasonable care should be known, to the VA personnel to be materially false with respect to any item of the consent requirements.

d. Other than the patient who is the subject of the medical record, no person or entity may be advised that a special written consent (such as VA Form 10-5345) is required in order to disclose medical record information relating to drug abuse, alcoholism or alcohol abuse, tests for or infection with the HIV, or sickle cell anemia. Where a person presents VA with an insufficient consent for records protected by 38 U.S.C. Section 4132, VA must, in the process of obtaining a legally sufficient consent, correspond only with the patient whose records are involved or the legal guardian of an incompetent patient or next of kin of a deceased patient, and not with any other person.

9.81 PROHIBITION ON REDISCLOSURE

Whenever a written disclosure is made with the patient's written consent, the disclosure will be accompanied by a written statement substantially as follows:

> "This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR Part 2, 52 FR 21796). Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any human immunodeficiency virus, sickle cell anemia or alcohol or drug abuse patient."

9.82 PREVENTION OF MULTIPLE ENROLLMENTS (NOT APPLICABLE TO HUMAN IMMUNODEFICIENCY VIRUS OR SICKLE CELL ANEMIA RECORDS)

a. For the purpose of this paragraph:

(1) The term "central registry" means an organization which obtains from two or more member programs, patient identifying information about individuals applying for maintenance treatment or detoxification treatment, for the purpose of avoiding an individual's concurrent enrollment in more than one program.

(2) The term "member program" means a non-VA detoxification treatment or maintenance treatment program which reports patient identifying information to a central registry and which is in the same State as that central registry or is not more than 125 miles from any border of the State in which the central registry is located.

b. For the purpose of preventing the multiple enrollment of a patient, with the patient's written consent a health care facility may disclose patient records to a central registry which is located in the same State, or is not more than 125 miles from any border of the State, or to any non-VA detoxification or maintenance treatment program not more than 200 miles away. A disclosure may be made when the patient is accepted for treatment, the type or dosage of the drug is changed, or the treatment is interrupted, resumed or terminated. The disclosure must be limited to patient identifying information, type and dosage of the drug, and relevant dates. The disclosure only can be made with the patient's written consent which meets the requirements of paragraph 9.80. The consent must list the name and address of each central registry and each known non-VA detoxification or maintenance treatment program to which a disclosure will be made. The consent may be so indicated to authorize disclosure to any non-VA detoxification or maintenance treatment program which is established within 200 miles after the consent is given without naming any such program. When a patient is enrolled in another program, the VA health care facility and the member programs may communicate as necessary to verify that no error has been made and to prevent or eliminate any multiple enrollment.

c. Information that is disclosed to a central registry or non-VA detoxification or maintenance treatment program to prevent multiple enrollments may not be redisclosed or patient identifying information used for any purpose other than the prevention of multiple enrollments unless such disclosure is authorized by an appropriate court order.

9.83 CRIMINAL JUSTICE SYSTEM REFERRALS

a. With the written consent of the patient, information may be disclosed to those persons within the criminal justice system who have made participation in a treatment program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody. Disclosure may be made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (e.g., a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or posttrial release, probation or parole officers responsible for supervision of the patient).

b. The written consent must meet the requirements of paragraph 9.80 and must state the period during which it remains in effect. The period must be reasonable, taking into

account:

(1) The anticipated length of the treatment;

(2) The type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and

(3) Such other factors as the facility, the patient, and the person(s) who will receive the disclosure consider pertinent.

c. The written consent must state that it is revocable upon the passage of a specified period of time or the occurrence of a specified, ascertainable event. The time or occurrence upon which consent becomes revocable may be no earlier than the individual's completion of the treatment program and no later than the final disposition of the conditional release or other action in connection with which the consent was given.

d. Information disclosed to individuals within the criminal justice system under this section may be redisclosed and used only to carry out that person's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

9.84 INCOMPETENT AND DECEASED PATIENTS

a. When consent is required for a disclosure, a written consent may be given by an incompetent patient's court appointed guardian.

b. Consent for disclosures from the record of a deceased patient treated for drug or alcohol abuse, HIV, or sickle cell anemia may be given by the next of kin, executor, administrator, or other personal representative of the deceased. Disclosure will be made only for the purpose of obtaining survivorship benefits for the deceased patient's survivor(s). This would include not only VA benefits, but also payments by the Social Security Administration, Worker's Compensation Boards or Commissions, other Federal, State, or local government agencies, or nongovernment entities, such as life insurance companies. Under the survivorship benefit provision, sickle cell anemia information may be released to a blood relative of a deceased veteran for medical follow-up or family planning purposes. Disclosures may be made without a written consent in order to comply with Federal or State laws requiring the collection of death and other vital statistics. Information may be disclosed to a coroner or medical examiner in response to a standing request in order to permit inquiry into a death for the purpose of determining cause of death.

9.85 DISCLOSURE WITHOUT PATIENT'S CONSENT

a. **Medical Emergencies**

(1) Patient information may be disclosed to medical personnel who have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of that patient or any other patient and which requires immediate medical intervention.

(2) Patient identifying information may be disclosed to medical personnel of the FDA (Food and Drug Administration) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of

a product under FDA jurisdiction. FDA may use the information for the exclusive purpose of notifying patients or their physicians of potential dangers.

(3) Following the disclosure of information under these provisions, the employee making the disclosure will make an accounting of the disclosure in accordance with the PA and 38 CFR 1.576(c) and document the disclosure in the patient's medical record setting forth in writing:

(a) The name and address of the medical personnel to whom the disclosure was made and their affiliation with any health care facility;

(b) The name of the individual making the disclosure;

(c) The date and time of the disclosure;

(d) The nature of the emergency (or error, if the report was to FDA);

(e) The information disclosed; and

(f) The authority for making the disclosure (38 U.S.C. 4132(b)(2)(A)).

(4) A written notification of the disclosure will be mailed to the patient's last known address.

b. **Disclosure of information related to infection with the HIV to public health authorities**

(1) Information relating to an individual's infection with the HIV may be disclosed from a medical record to a Federal, State, or local public health authority that is charged under Federal or State law with the protection of the public health. A Federal or State law must require disclosure of the information for a purpose that is authorized by law and a qualified official of the public health authority must make a written request for the information. The disclosure of patient name and address under this paragraph must be permitted also by 38 U.S.C. 3301(f)(2) which provides for the disclosure of patient name and address to any criminal or civil law enforcement governmental agency or instrumentality charged under applicable law with the protection of the public health so long as the disclosure is for a public health enforcement purpose authorized by law. A State law under which a request for such information is made must require disclosure of name, address and infectious disease information and the law must provide the State public health agency with authority to impose fines or other penalties against those individuals who are subject to the jurisdiction of the public health agency but fail to comply with the State's reporting requirements. Accordingly, where a State HIV reporting law does not empower the public health agency to impose sanctions for nonreporting, VA has no authority under 38 U.S.C. 3301(f)(2) to disclose name and address information to such public health agencies for State reporting purposes. There is authority under those circumstances to report HIV information, but without the name and address of the patient, if doing so would serve a useful purpose (38 U.S.C. 3301(e)). Information related to HIV infection may be released for the purpose of public health enforcement, however, it may not be released for public safety purposes (38 U.S.C. 4132(b)(2)(C)(i)).

(2) The policy included in paragraph 9.51 will be followed in the release of information to public health authorities. Information that is disclosed will be limited to that

information which is required by law. In making a disclosure of HIV infection information under an HIV public health authority disclosure requirement, information generally may not be released regarding a patient's treatment for drug abuse, alcoholism or alcohol abuse, or sickle cell anemia. Information concerning an individual's use of needles for self-injection of drugs not prescribed by a physician may be reported to public health officials in the collection of data base information as a social and risk factor if the information is obtained in connection with a program or activity relating to testing for or infection with the HIV. However, such information cannot be reported if it is recorded by VA for the purpose of treatment for drug abuse.

(3) The person to whom patient name and address information is disclosed will be notified in writing that the information may not be redisclosed or used for a purpose other than that for which the disclosure was made. The notification will inform the person that anyone who violates any provision of 38 U.S.C. Section 4132, or the prohibition on redisclosure of a name or address for a purpose other than the one for which the disclosure was made, shall be fined up to $5,000 in the case of a first offense and up to $20,000 in the case of a subsequent offense.

(4) In any case where a public health authority has requested the reporting of name, address, and infectious disease information and the District Counsel has determined that the State law under which the reporting was requested is not sufficient under 38 U.S.C. 3301 and 4132 to permit the disclosure of patient name and address, the infectious disease information will be reported using a Soundex code rather than patient name and address.

c. **Disclosure of information related to infection with the HIV to the spouse or sexual partner of the patient:**

(1) The treating physician or a professional counselor may disclose information indicating that a patient is infected with the HIV if the disclosure is made to the spouse of the patient, or to an individual whom the patient has, during the process of professional counseling or of testing to determine whether the patient is infected with the virus, identified as being a sexual partner.

(2) Disclosure may be made only if the treating physician or counselor, after making reasonable efforts to counsel and encourage the patient to provide the information to the spouse or sexual partner:

(a) Reasonably believes that the patient will not provide the information; and

(b) That the disclosure is necessary to protect the health of the spouse or sexual partner.

(3) If the treating physician or counselor who counseled the patient about providing the information to the spouse or sexual partner is unavailable due to absence on extended leave or termination of employment, disclosure may be made by another physician or counselor.

(4) Before any patient gives consent to being tested for the HIV, as part of pre-test counseling, the patient must be informed fully about this notification provision.

(5) In each case of a patient with a positive HIV test result who has a spouse or has identified an individual as a sexual partner, the treating physician or professional

counselor will document in the progress notes of the medical record the factors that are considered which lead to a decision as to whether an unconsented disclosure of the HIV infection information should be made to the patient's spouse or sexual partner. Any disclosure will be fully documented in the progress notes of the patient's medical record.

d. **Research Activities**

(1) Subject to the provisions of this subparagraph and paragraph 9.54, drug or alcohol abuse, HIV, or sickle cell anemia medical records with patient identifying information may be disclosed for the purpose of conducting scientific research if it is determined by the Chief Medical Director or Medical Center Director that the recipient of the information is qualified to conduct the research. The individual must have a research protocol under which the information will be maintained in accordance with the security requirements of paragraph 9.78 (or more stringent requirements) and will not be redisclosed except as permitted under subparagraph (2). The individual must furnish a written statement that the research protocol has been reviewed by an independent group of three or more individuals who found that the rights of patients would be adequately protected and that the potential benefits of the research outweigh any potential risks to patient confidentiality posed by the disclosure of records.

(2) A person conducting research may disclose information obtained under subparagraph (1) only back to VA and may not identify any individual patient in any report of that research or otherwise disclose patient identities.

e. **Audit and evaluation activities**

(1) Subject to the provisions of this subparagraph and paragraph 9.55, drug or alcohol abuse, HIV, or sickle cell anemia medical records with patient identifying information may be disclosed for the purpose of conducting audit and evaluation activities.

(2) Patient medical records, consistent with the provisions of the PA and 38 U.S.C. 3301, may be disclosed in the course of a review of records on VA facility premises to any person who agrees in writing to comply with the limitations on redisclosure and use in subparagraph (4) when the audit or evaluation functions are performed by a State or Federal governmental agency on behalf of VA, or it is determined by the facility Director that the individual is qualified to conduct the audit or evaluation activities.

(3) Patient medical records, consistent with the provisions of the PA and 38 U.S.C. 3301, may be reviewed and copied by any person who is determined by the medical facility Director to be qualified to conduct the audit or evaluation activities. The individual must agree in writing to maintain the patient identifying information in accordance with the security requirements provided in paragraph 9.78 (or more stringent requirements) and destroy all the patient identifying information upon completion of the audit or evaluation.

(4) Patient identifying information disclosed under this subparagraph may be disclosed only back to VA and used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities as authorized by a court order under the provisions of paragraph 9.86e.

f. **DEA (Drug Enforcement Administration) and FDA (Food and Drug Administration) for specified statutory audit activities concerning the health care facility**

(1) Authorized agents to the DEA and FDA are permitted access to treatment facilities in order to carry out their program oversight duties under the Controlled Substances Act, the Comprehensive Drug Abuse Prevention and Control Act of 1970, and the Federal Food, Drug and Cosmetic Act. These agents may have access to patient medical records in order to conduct these audit activities. However, in the event these activities shift from audit to investigation, the Agency may no longer have access to medical records unless they obtain a court order.

(2) The agents may be provided with patient names and addresses for the sole purpose of auditing or verifying records. They must exercise all reasonable precautions to avoid inadvertent disclosure of patient identities to third parties and may not compile any information in a registry or personal data bank.

9.86 COURT ORDERS AUTHORIZING DISCLOSURE AND USE

a. **Legal Effect of Order**

(1) Records that relate to drug abuse, alcoholism or alcohol abuse, HIV, or sickle cell anemia may be disclosed if authorized by an appropriate order of a court of competent jurisdiction (Federal or State) under the provisions of 42 CFR 2.1-2.67 (52 FR 21796). An application for a court order must use a fictitious name such as "John Doe" to refer to any patient. A subpoena is not sufficient authority to authorize disclosure of these records. An order authorizing a disclosure that is issued by a Federal court compels disclosure of the record. However, such an order from a State court only acts to authorize the health care facility Director to exercise discretion to disclose the records. The procedures set forth in 38 CFR 1.511(c) should be followed in responding to a State court order (see par. 9.62).

(2) In assessing a request to issue an order, the court is statutorily required to weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. To assist the court in weighing the interests involved in a court order disclosure, a health care facility, after consultation with District Counsel, may provide the court expert evidence from VA health care professionals explaining the effect a court order could have on a patient's privacy, the patient-physician relationship, and the continued viability of the treatment program. Upon granting an order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, is required by statute to impose appropriate safeguards against unauthorized disclosure (38 U.S.C. 4132(b)(2)(D)). A Federal or State court order to produce records will not be sufficient, unless the order reflects that the court has imposed appropriate safeguards.

b. **Not Applicable to Records Disclosed to Researchers, Auditors and Evaluators.** A court order may not authorize personnel who have received patient identifying information from VA without patient consent for the purpose of conducting research, audit or evaluation, to disclose that information or use it to conduct any criminal investigation or prosecution of a patient. However, a court order may authorize disclosure from VA and the subsequent use of such records to investigate or prosecute VA personnel.

c. **Disclosures for Noncriminal Purposes.** An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is

sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of par. 9.80) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(1) The patient and VA must be given adequate notice and an opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on whether the statutory and regulatory criteria for the issuance of the court order are met.

(2) Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or VA, unless the patient requests an open hearing in a manner which meets the written consent requirements of paragraph 9.80. The proceeding may include an examination by the judge of the patient records.

(3) An order may be entered only if the court determines that good cause exists. To make this determination the court must find that other ways of obtaining the information are not available or would not be effective and the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(4) An order authorizing a disclosure must limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order and to those persons whose need for the information is the basis for the order. The order must include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services (such as sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered).

d. **To Criminally Investigate or Prosecute Patients.** An order authorizing the disclosure or use of patient records to criminally investigate or prosecute a patient may be applied for by VA or by any person conducting investigative or prosecutorial activities with respect to the enforcement of criminal laws. The application may be filed separately, as part of an application for a compulsory process, or in a pending criminal action. An application must use a fictitious name to refer to any patient and may not contain or otherwise disclose patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny.

(1) Unless an order under subparagraph e. is sought with an order under this subparagraph, VA must be given adequate notice of an application by a person performing a law enforcement function. In addition, VA must be given an opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order, and an opportunity to be represented by counsel. Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient, or VA. The proceeding may include an examination by the judge of the patient records.

(2) A court may authorize the disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient only if the court finds that all of the following criteria are met:

(a) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.

(b) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.

(c) Other ways of obtaining the information are not available or would not be effective.

(d) The potential injury to the patient, to the physician-patient relationship and to the ability of VA to provide services to other patients is outweighed by the public interest and the need for the disclosure.

(e) If the applicant is a person performing a law enforcement function, VA has been represented by counsel independent of the applicant.

(3) Any order authorizing a disclosure or use of patients records must limit disclosure and use to those parts of the patient's record which are essential to fulfill the objective of the order and to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution. The order must limit their use of the records to the investigation and prosecution of the crime or suspected crime that is specified in the application. The order must include any other measures that are necessary to limit disclosure and use to the fulfillment on only that public interest and need that is found by the court.

e. **To Investigate or Prosecute VA.** An order authorizing the disclosure or use of patient records to criminally or administratively investigate or prosecute VA, or employees or agents of VA, may be applied for by an administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency that has jurisdiction over VA activities. The application may be filed separately or as part of a pending civil or criminal action against VA (or agents or employees) in which it appears that the records are needed to provide material evidence. The application must use a fictitious name to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has given a written consent to the disclosure.

(1) An application may, at the discretion of the court, be granted without notice. Although no express notice is required to VA or to any patient whose records are to be disclosed, upon implementation of an order that is granted, VA or the patient must be given an opportunity to seek revocation or amendment of the order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order.

(2) The order must be entered in accordance with, and comply with the requirements of, subparagraphs c(3) and c(4). The order must require the deletion of patient identifying information from any documents that are made available to the public.

(3) No information obtained as a result of the order may be used to conduct any investigation or prosecution of a patient, or be used as the basis for an

application for an order to criminally investigate or prosecute a patient.

f. **Use of Undercover Agents and Informants.** An order authorizing the placement of an undercover agent or informant in a VA drug or alcohol abuse, HIV infection, or sickle cell anemia treatment program as an employee or patient may be applied for by any law enforcement or prosecutorial agency which has reason to believe that employees or agents of the VA treatment program are engaged in criminal misconduct. The health care facility Director must be given adequate notice of the application and an opportunity to appear and be heard (for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the order). The order may be granted without notice if the application asserts a belief that the Director is involved in the criminal activities or will intentionally or unintentionally disclose the proposed placement to the employees or agents who are suspected of the activities.

(1) An order may be entered only if the court determines that good cause exists. To make this determination the court must find that there is reason to believe that an employee or agent of VA is engaged in criminal activity, that other ways of obtaining evidence of this criminal activity are not available or would not be effective, and that the public interest and need for the placement of an agent or informant outweigh the potential injury to patients of the program, physician-patient relationships and the treatment services.

(2) The order must specifically authorize the placement of an agent or informant and limit the total period of the placement to six months. The order must prohibit the agent or informant from disclosing any patient identifying information obtained from the placement except as necessary to criminally investigate or prosecute employees or agents of the treatment program. The order must also include any other measures that are appropriate to limit any potential disruption of the program by the placement and any potential for a real or apparent breach of patient confidentiality, such as sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

(3) No information obtained by an undercover agent or informant may be used to criminally investigate or prosecute any patient or as the basis for an application for an order to criminally investigate or prosecute a patient.

9.87 DISCLOSURE TO PATIENT'S FAMILY AND OTHERS

With a patient's valid signed consent, information concerning the patient's treatment for drug or alcohol abuse, HIV, or sickle cell anemia may be disclosed to any person with whom the patient has a personal relationship. Disclosure will not be made in any case where the person responsible for the patient's treatment determines that the disclosure would be harmful to the patient.

9.88 DISCLOSURES TO THIRD PARTY PAYERS

In the absence of a court order (see above), disclosure of drug or alcohol abuse, HIV, or sickle cell anemia patient information to third party payers may be made only with the written consent of the patient. Any such disclosure must be limited to that information which is reasonably necessary for the discharge of the legal or contractual obligations of the third party payer. Medical care cost recovery action will not be initiated if the patient's written consent is not obtained to permit disclosure of the necessary

information. In cases where a substantial bill is involved (i.e., $25,000 or more) consideration may be given to seeking a court order (38 U.S.C. 4132(b)(2)(D)) to permit disclosure. Such cases will be discussed with the District Counsel.

9.89 DISCLOSURES TO CONGRESSIONAL OFFICES

a. When an inquiry made at the request of a patient is received from a Congressional office and the request concerns drug or alcohol abuse, HIV, or sickle cell anemia medical information, the information will not be released unless the patient's specific written consent is provided, which includes the eight required elements identified in paragraph 9.80. If an appropriate consent is provided, the Member of Congress will be advised that the information has been disclosed from records whose confidentiality is protected by Federal law. The Member of Congress will be further advised that Federal regulations (42 CFR Pt 2) prohibit any further disclosure of the information without the specific written consent of the patient. A general authorization for the release of information is not sufficient for that purpose. If an appropriate consent is not provided, the Member of Congress will be advised that the request concerns information the disclosure of which is prohibited by Federal law and is therefore not included in the response. When appropriate, the patient will be contacted in order to obtain the appropriate written consent.

b. The provisions of paragraph 9.23b apply to requests that are made on behalf of a Committee or Subcommittee of Congress when the inquiry concerns drug or alcohol abuse, HIV, or sickle cell anemia medical records and the information is needed for an oversight function.

9.90 PENALTIES

a. Any person who violates any provision of 38 U.S.C. 4132 or 42 CFR 2.1-2.67 (52 FR 21796) shall be fined not more than $5,000 in the case of a first offense, and not more than $20,000 in each subsequent offense.

b. Where an individual has committed one offense, any offense committed under the same section or any other section of these provisions will be treated as a subsequent offense.